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1932.

THE

LAW REPORTS

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HOUSE OF LORDS,
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

◆

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1932.

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MEMORANDA.

1931.

Dec. 17. *This day the* HONOURABLE SIR MICHAEL MYERS, K.C.M.G., *Chief Justice of New Zealand, was, by His Majesty's command, appointed a Member of His Majesty's Most Honourable Privy Council.*

1932.

Jan. 29. SIR THOMAS WALKER HOBART INSKIP, C.B.E., K.C., *was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir William Allen Jowitt, K.C., resigned.*

Jan. 29. SIR FRANK BOYD MERRIMAN, O.B.E., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Thomas Walker Hobart Inskip.*

Feb. 1. *The King was pleased to confer the dignity of a Viscount of the United Kingdom upon the* RIGHT HON. JOHN, BARON SANKEY, G.B.E., *Chancellor of Great Britain, by the name, style and title of Viscount Sankey of Moreton, in the County of Gloucester.*

Feb. 11. *This day* SIR THOMAS WALKER HOBART INSKIP, C.B.E., K.C., *was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Feb. 23. HERBERT DU PARCQ, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

Mar. 13. *This day the* RIGHT HON. LORD ATKINSON, *sometime a Lord of Appeal in Ordinary, died at his residence,* 39 *Hyde Park Gate, S.W., aged* 87.

Apr. 5. RAYNER GODDARD, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

Apr. 11. THE HON. SIR ROBERT ALDERSON WRIGHT, *one of the Justices of His Majesty's High Court of Justice, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1876, *and was granted the dignity of a Baron for life by the style and title of Baron Wright of Durley, in the County of Wilts.*

Apr. 11. THE HON. GEOFFREY LAWRENCE, D.S.O., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of the Hon. Mr. Justice Wright, and was afterwards knighted.*

Apr. 19. JAMES WILLOUGHBY JARDINE, ESQ., K.C., *was appointed to be His Majesty's Solicitor-General of the County Palatine of Durham.*

Apr. 23. *This day the* RIGHT HON. ROBERT ALDERSON, BARON WRIGHT, *Lord of Appeal in Ordinary, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Apr. 27. *This day the* RIGHT. HON. SIR ADRIAN KNOX, K.C.M.G., *formerly Chief Justice of Australia and a member of the Judicial Committee of the Privy Council, died at his residence at Woollahra, Sydney, Australia, in his* 69*th year.*

Apr. 28. WALTER TURNER MONCKTON, ESQ., K.C., *was appointed by His Royal Highness the Prince of Wales to be his Attorney-General and a Member of the Council of His Royal Highness.*

June 3. *The King was pleased to confer the dignity of a Viscount of the United Kingdom upon the* RIGHT HON. STANLEY OWEN, BARON BUCKMASTER, G.C.V.O., *sometime Lord Chancellor of Great Britain.*

June 10. *This day* SIR SIDNEY ARTHUR TAYLOR ROWLATT, K.C.S.I., *lately one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

June 10. *This day the* HON. SIR FRANK GAVAN DUFFY, K.C.M.G., *Chief Justice of the High Court of Australia, was, by His Majesty's command, appointed a Member of His Majesty's Most Honourable Privy Council.*

July 21. *This day* SIR HORACE EDMUND AVORY, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Oct. 18. THE HON. MR. JUSTICE LUXMOORE *was appointed to be the Appeal Tribunal constituted under section* 92A *of the Patents and Designs Act,* 1907.

Nov. 10. *His Majesty in Council was this day pleased to appoint the* RIGHT HON. THOMAS JAMES CHESSHYRE, BARON TOMLIN (*Lord of Appeal in Ordinary*), *to be a Member of the Universities Committee of the Privy Council, in accordance with the provisions of the Universities of Oxford and Cambridge Act,* 1877.

ERRATA.

Page	*Lines*	*For*	*Read*
108	12	appeal	petition
426	1	Beaulieu K.C.	Beaubieu K.C.
526	footnote	Lord Sankey L.C.	Viscount Sankey L.C.
533	2		
542	footnote		
675	11 and 13 from foot	" judgment "	" opinion "

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1932, will be as follows:—

In the First Series,
[1932] 1 Ch. [1932] 2 Ch.
In the Second Series,
[1932] 1 K. B. [1932] 2 K. B. [1932] P.
In the Third Series,
[1932] A. C.

The SCOTTISH LAW REPORTS are cited as follows:

Shaw, or, First Series Court of Session Cases	by	S.
Dunlop, or, Second Series ,, ,, ,,	,,	D.
Macpherson, or, Third Series ,, ,, ,,	,,	M.
Rettie, or, Fourth Series ,, ,, ,,	,,	R.
Fraser, or, Fifth Series ,, ,, ,,	,,	F.
New Series ,, ,, ,,	,,	1907 S. C.
Scottish Law Reporter ,, ,, ,,	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	,,	Mor. Dict.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

A. PAGE

Abeyesekera *v.* Jayatilake P. C. 260
Aeronautics in Canada, In re Regulation and Control of P. C. 54
Aspro, Ld. *v.* Commissioner of Taxes – – – P. C. 683
Assicurazioni Generali *v.* Selim Cotran – – P. C. 268
Attorney-General, Hearts of Oak Assurance Co., Ld. *v.* H. L. (E.) 392
Attorney-General *v.* Jackson H. L. (E.) 365
Attorney-General for Canada, Attorney-General for Quebec *v.* In re Silver Brothers, Ld. P. C. 514
Attorney-General for Newfoundland, Jardine *v.* – – P. C. 275
Attorney-General for New South Wales *v.* Trethowan – P. C. 526
Attorney-General for Quebec *v.* Attorney-General for Canada. In re Silver Brothers, Ld. P. C. 514

PAGE

Attorney-General for Trinidad, Kossekechatko *v.* – P. C. 78
Australian Investment Trust, Ld. *v.* Strand and Pitt Street Properties, Ld. – – P. C. 735

B.

Banco de Portugal *v.* Waterlow & Sons, Ld. – H. L. (E.) 452
——— Waterlow & Sons, Ld. *v.* H. L. (E.) 452
Barrell *v.* Fordree – H. L. (E.) 676
Bass, Ratcliff & Gretton, Ld. *v.* Nicholson & Sons, Ld. H. L. (E.) 130
B. C. Fir and Cedar Lumber Co., Ld., The King *v.* – P. C. 441
Bell *v.* Lever Brothers, Ld. H. L. (E.) 161
Beloe, Stedeford *v.* H. L. (E.) 388

C.

PAGE

Cadzow Coal Co., Ld., Connor *v.* H. L. (Sc.) 1
Canada, Aeronautics in, Regulation and Control of, In re P. C. 54
——— Radio Communication in, Regulation and Control of, In re – – – P. C. 304
City of Outremont, Montreal Light, Heat and Power Consolidated *v.* – – P. C. 423
Civilian War Claimants Association, Ld. *v.* The King H. L. (E.) 14
Collyer, Hoare & Co., Ld. *v.* H. L. (E.) 407
Commissioner of Taxes, Aspro, Ld. *v.* – – – P. C. 683
Congrégation des Petits Frères de Marie, Regent Taxi and Transport Co., Ld. *v.* – P. C. 295
Connor *v.* Cadzow Coal Co., Ld. H. L. (Sc.) 1
Consolidated London Properties *v.* Johnstone – H. L. (E.) 351
Cowan, James *v.* – – P. C. 542
Cowper (N. L.) *v.* Paper Sacks Proprietary, Ld. – – P. C. 709

D.

Davis (Lady) *v.* Lord Shaughnessy – – – P. C. 106
Donoghue *v.* Stevenson H. L. (Sc.) 562

E.

English, Scottish and Australian Bank, Ld. *v.* Commissioners of Inland Revenue – H. L. (E.) 238

F.

Fir (B. C.) and Cedar Lumber Co., Ld., The King *v.* – P. C. 441
Fordree, Barrell *v.* – H. L. (E.) 676
Foscolo, Mango & Co., Ld., Stag Line, Ld. *v.* H. L. (E.) 328

G.

PAGE

Geel (Jacob), Winnipeg Electric Co. *v.* – – – P. C. 690
Green, Toogood & Sons, Ld. *v.* H. L. (E.) 663

H.

Hearts of Oak Assurance Co., Ld. *v.* Attorney-General H. L. (E.) 392
Hoare & Co., Ld. *v.* Collyer H. L. (E.) 407
Holder *v.* Inland Revenue Commissioners – – H. L. (E.) 624

I.

Inland Revenue Commissioners, English, Scottish and Australian Bank, Ld. *v.* – – H. L. (E.) 238

Holder *v.* – – H. L. (E.) 624

Keren Kayemeth Le Jisroel, Ld. *v.* – – H. L. (E.) 650
Insurance Act of Canada, In re P. C. 41

J.

Jackson, Attorney-General *v.* H. L. (E.) 365
James *v.* Cowan – – P. C. 542
Jardine *v.* Attorney-General for Newfoundland – – P. C. 275
Jayatilake, Abeyesekera *v.* P. C. 260
Johnstone, Consolidated London Properties, Ld. *v.* H. L. (E.) 351

K.

Keren Kayemeth Le Jisroel, Ld. *v.* Inland Revenue Commissioners – – H. L. (E.) 650
Kossekechatko *v.* Attorney-General for Trinidad – P. C. 78

L.

PAGE

Lever Brothers, Ld., Bell *v.* H. L. (E.) 161
Li Po Kwai, Tsang Chuen *v.* P. C. 715
Lymburn (J. F.) *v.* A. H. Mayland – – – – P. C. 318

M.

M'Alister *v.* Stevenson. *See* Donoghue *v.* Stevenson H. L. (Sc.) 562
Manson, Wesley *v.* – H. L. (E.) 635
Martineau (O.) & Sons, Ld. *v.* City of Montreal – – P. C. 113
Mayland (A. H.), J. F. Lymburn *v.* – – – – P. C. 318
Montreal City, O. Martineau & Sons, Ld. *v.* – – P. C. 113
—— *v.* Montreal Industrial Land Co., Ld. – P. C. 700
Montreal Industrial Land Co., Ld., Montreal City *v.* – P. C. 700
Montreal Light, Heat and Power Consolidated *v.* City of Outremont – – – – P. C. 423

N.

Natural Resources, Transfer of (Saskatchewan), In re – P. C. 28
Nicholson & Sons, Ld., Bass, Ratcliff & Gretton, Ld. *v.* H. L. (E.) 130

O.

O. Martineau & Sons, Ld. *v.* City of Montreal – – P. C. 113
Outremont City, Montreal Light, Heat and Power Consolidated *v.* – – – – P. C. 423

P.

Paper Sacks Proprietary, Ld., N. L. Cowper *v.* – – P. C. 709

R.

PAGE

Radio Communication in Canada, Regulation and Control of, In re – – P. C. 304
Regent Taxi and Transport Co., Ld. *v.* Congrégation des Petits Frères de Marie – – P. C. 295
Rex *v.* B. C. Fir and Cedar Lumber Co., Ld. – – P. C. 441
—— Civilian War Claimants Association, Ld. *v.* H. L. (E.) 14
—— Toronto City Corporation *v.* – – – – P. C. 98

S.

Saskatchewan, Transfer of Natural Resources in, In re P. C. 28
Selim Cotran, Assicurazioni Generali *v.* – – – P. C. 268
Shaughnessy (Lord), Lady Davis *v.* – – – – P. C. 106
Silver Brothers, Ld., In re. Attorney-General for Quebec *v.* Attorney - General for Canada – – – P. C. 514
Stag Line, Ld. *v.* Foscolo, Mango & Co., Ld. – – H. L. (E.) 328
Stedeford *v.* Beloe – H. L. (E.) 388
Stevenson, Donoghue *v.* H. L. (Sc.) 562
Strand and Pitt Street Properties, Ld., Australian Investment Trust, Ld. *v.* – P. C. 735

T.

Toogood & Sons, Ld. *v.* Green H. L. (E.) 663
Toronto City Corporation *v.* The King – – – P. C. 98
Trethowan, Attorney - General for New South Wales *v.* P. C. 526
Tsang Chuen *v.* Li Po Kwai P. C. 715

W.

Waterlow & Sons, Ld. *v.* Banco de Portugal – H. L. (E.) 452
—— Banco de Portugal *v.* – H. L. (E.) 452
Wesley *v.* Manson – H. L. (E.) 635
Winnipeg Electric Co. *v.* Jacob Geel – – – – P. C. 690

TABLE OF CASES CITED.

A.

		PAGE
Aberdeen Assessor *v.* Lumsden's Heirs	1932 S. L. T. 158	674, 675
Aberdeen Railway Company *v.* Blaikie Brothers	1 Macq. 461	195
Aeronautics in Canada, Regulation and Control of, In re	[1932] A. C. 504	305
Ahern & Soper, Ld. *v.* New York Trust Company	(1909) 42 Can. S. C. R. 267	424
Alberta Act, s. 17 of, In re	[1927] S. C. R. 364	32
Albion Steel and Wire Company, In re	7 Ch. D. 547	378
Alliance & Dublin Consumers Gas Company *v.* M'Williams	[1928] I. R. 1	442
Almada and Tirito Company, In re	38 Ch. D. 415	738
Ambler, In re	[1905] 1 Ch. 697	365
Amerciaments and Fines	3 Salk. 32	100
Annot Lyle (The)	11 P. D. 114	699
Arton, In re (No. 2)	[1896] 1 Q. B. 509	80
Association of Land Financiers	13 Ch. D. 373	378
Attorney-General *v.* Benjamin Smith & Co.	87 L. J. (K. B.) 1045	329
———— *v.* Bouwens	4 M. & W. 171	240
———— *v.* Dimond	1 Cr. & J. 356	240
———— *v.* Hope	1 C. M. & R. 530	240
———— *v.* Mutual Tontine Westminster Chambers Association	L. R. 10 Ex. 305; 1 Ex. D. 469	357
Attorney-General for Alberta *v.* Attorney-General for Canada	[1928] A. C. 475	30, 99
Attorney-General of British Columbia *v.* Attorney-General of Canada	[1924] A. C. 222	518
Attorney-General for British Columbia *v.* Attorney-General for Canada	[1914] A. C. 153	54
———— *v.* Attorney-General for Canada	[1924] A. C. 203	61
———— *v.* Attorney-General for Canada	14 App. Cas. 295	30
———— *v.* Attorney-General of Canada	[1924] A. C. 222	99
Attorney-General for Canada *v.* Attorney-General for Alberta	[1916] 1 A. C. 588	41
———— *v.* Attorney-General for British Columbia	[1930] A. C. 111	71, 516
———— *v.* Attorney-General for Ontario	[1898] A. C. 700	71, 100
———— *v.* Attorney-General for Provinces	[1898] A. C. 700	30
———— *v.* Attorney-General for Quebec	[1921] 1 A. C. 413	57
Attorney-General for Commonwealth of Australia *v.* Adelaide Steamship Company	[1913] A. C. 781	546

		PAGE
Attorney-General for Manitoba *v.* Attorney-General for Canada	[1925] A. C. 561	61, 321
——— *v.* Attorney-General for Canada	[1929] A. C. 260	42, 318, 548
——— *v.* Manitoba Licence Holders' Association	[1902] A. C. 73	60
Attorney-General for Ontario *v.* Attorney-General for Canada	[1896] A. C. 348	57
——— *v.* Attorney-General for Canada	[1912] A. C. 571	58
——— *v.* Attorney-General for the Dominion	[1896] A. C. 348	309
——— *v.* Hamilton Street Railway Company	[1903] A. C. 524	99, 320
——— *v.* Mercer	8 App. Cas. 767	103
——— *v.* Reciprocal Insurers	[1924] A. C. 328	41
Attorney-General for Quebec *v.* Nipissing Central Railway Company	[1926] A. C. 715	515
Attwood *v.* Lamont	[1920] 3 K. B. 571	60
Audain, Ex parte	42 Ch. D. 1	735, 745

B.

Balfour *v.* Sea Fire Life Assurance Company	3 C. B. (N. S.) 300	165
Banbury *v.* Bank of Montreal	[1918] A. C. 626	697
Banham (George) & Co. *v.* Reddaway & Co.	[1927] A. C. 406	134
Bank Line *v.* Arthur Capel & Co.	[1919] A. C. 435	167
Bank of England *v.* Vagliano Brothers	[1891] A. C. 107	342
Barker *v.* Edger	[1898] A. C. 748	707
Baron de Bode's Case	8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 449	20
Barr *v.* Gibson	3 M. & W. 390	165
Barton *v.* Bank of New South Wales	15 App. Cas. 379	729
Bates *v.* Batey & Co., Ld.	[1913] 3 K. B. 351	565
Baxter *v.* Commissioners of Taxation for New South Wales	(1907) 4 C. L. R. 1087	547
B. C. Fir and Cedar Lumber Co. *v.* Minister of National Revenue	[1930] Can. Ex. R. 59	442
Bedford College *v.* Guest	89 L. J. (K. B.) 586	678
Bélair *v.* La Ville de Ste. Rose	(1922) 63 Can. S. C. R. 526	424
Bell Telephone Company *v.* Cité de Hull	(1922) Q. R. 61 S. C. 222	425
Bethell's Case	1 Salk. 348	81
Bickerton *v.* Walker	31 Ch. D. 151	731
Birmingham Vinegar Brewery Company *v.* Powell	[1897] A. C. 710	132
Blackcock (The)	[1900] P. 1	473, 493
Blacker *v.* Lake Elliot, Ld.	106 L. T. 533	565
Blackmore *v.* Bristol and Exeter Railway Company	8 E. & B. 1035	573
Board of Commerce Act, 1919, In re	[1922] 1 A. C. 191	59, 309
Bonham, In re	10 Ch. D. 595	377
Boord & Son *v.* Bagots, Hutton & Co.	[1916] 2 A. C. 382	135

		PAGE
Boston Deep Sea Fishing Company v. Ansell	6 C. & P. 15	165
Bottomley v. Bannister	[1932] 1 K. B. 458; 101 L. J. (K. B.) 46	598
Bowman v. Secular Society	[1917] A. C. 406	652
Bradlaugh v. Clarke	8 App. Cas. 354	98
Brass v. Maitland	6 E. & B. 470	597
Breakey v. Township of Metgermette	(1920) 61 Can. S. C. R. 237	425
Brooks-Bidlake and Whittall, Ld. v. Attorney-General for British Columbia	[1923] A. C. 450	42
Brown v. William Dixon, Ld.	1929 S. C. 206	3
Byron v. Byron	1 Cro. Eliz. 472	239, 240
Burk v. Tunstall	2 B. C. R. 12	121
Burrows v. Wilsons and Clyde Coal Company	[1929] A. C. 651; 1929 S. C. (H. L.) 133	8

C.

Caledonian Railway Company v. Mulholland or Warwick	[1898] A. C. 216	597
Calvin's Case	7 Co. Rep. 1a, 17b	264
Cameron v. Young	[1908] A. C. 176; 1908 S. C. (H. L.) 7	609
Campbell v. Hall	1 Cowp. 204	262
———— v. Lill	42 Times L. R. 397	678
Canada Cement Company v. Town of East Montreal	[1922] 1 A. C. 249	426
Carnat v. Matthews	16 Alberta L. R. 275	697
Carritt v. Real and Personal Advance Company	42 Ch. D. 263	729
Cavalier v. Pope	[1906] A. C. 428	564
Cité de Sainte-Cunégonde v. Montreal Water and Power Company	(1912) Q. R. 41 S. C. 500	424
Citizens Insurance Co. v. Parsons	7 App. Cas. 96	45
Clark, In re	[1904] 1 Ch. 294	240
Clayton's Case	1 Mer. 572	630
Clelland v. Robb	1911 S. C. 253	602
Clifton v. Bury	4 Times L. R. 8	57
Collis v. Selden	L. R. 3 C. P. 495	573
Colonial Building and Investment Association v. Attorney-General of Quebec	9 App. Cas. 157	320
Commissaires d'Ecoles de St. Joseph de Bordeaux v. Gagnon	(1916) Q. R. 51 S. C. 175	426
Commissioner of Stamps v. Hope	[1891] A. C. 476	240
Companies Act, 1929, In re	25 Alb. L. R. 206	320
Connecticut Fire Insurance Company v. Kavanagh	[1892] A. C. 473	192
Cookshire (Town of) v. Canadian Telephone Company	(1913) Q. R. 44 S. C. 126	425
Coomber v. Justices of Berkshire	9 App. Cas. 61	517
Cooper v. Phibbs	L. R. 2 H. L. 149	164
Costa Rica Railway Company v. Forwood	[1901] 1 Ch. 746	172
Counter v. Macpherson	5 Moo. P. C. 83	289

		PAGE
Couturier *v.* Hastie	5 H. L. C. 673	165
Cunningham *v.* Tomey Homma	[1903] A. C. 151	42
Cunnington *v.* Great Northern Railway Company	49 L. T. 392	585

D.

Dahnke-Walker Milling Company *v.* Bondurant	257 U. S. 282	547
Danubian Sugar Factories, Ld. *v.* Inland Revenue Commissioners	[1901] 1 K. B. 245	238
Davenport *v.* The Queen	3 App. Cas. 115	276
de Bode (Baron) Case	8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 449	20
Deere (John) Plow Company *v.* Wharton	[1915] A. C. 330	45, 58, 319
D'Emden *v.* Pedder	(1904) 1 C. L. R. 91	547
Dilworth *v.* Commissioner of Stamps	[1899] A. C. 99	442
Dixon *v.* Bell	5 M. & S. 198	565
Dobie *v.* Temporalities Board	7 App. Cas. 136	309
Dominion Natural Gas Company. *v.* Collins & Perkins	[1909] A. C. 640	564
Duncan *v.* State of Queensland	(1916) 22 C. L. R. 556	545
Duncan's Executors *v.* Farmer	1909 S. C. 1212; 5 Tax Cas. 417	388

E.

Earl *v.* Lubbock	[1905] 1 K. B. 253	575
Ebner *v.* Lascelles	[1928] 2 K. B. 486	678
Elliott *v.* Hall	15 Q. B. D. 315	585
Emmens *v.* Pottle	16 Q. B. D. 354	608
Eno *v.* Dunn	15 App. Cas. 252	142
Epsom Grand Stand Association *v.* Clarke	35 Times L. R. 525	678
Evans (Richard) & Co., Ld. *v.* Scahill	20 B. W. C. C. 348	12
E. W. Gillett & Co. *v.* Lumsden	[1905] A. C. 601	106
Exchange Bank of Canada *v.* The Queen	11 App. Cas. 157	517

F.

Farrant *v.* Barnes	11 C. B. (N. S.) 553	597
Faure Electric Accumulator Co., In re	40 Ch. D. 141	738
Fenton *v.* J. Thorley & Co.	[1903] A. C. 443	319, 547
Fernandes' Executors Case	L. R. 5 Ch. 314	256
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1	546
Finlay (James) & Co. *v.* N. V. Kwik Hoo Tong Handel Maatschappij	[1929] 1 K. B. 400	471
Finn *v.* Kerslake	[1931] A. C. 446, 457	663
Fir (B. C.) & Cedar Lumber Company *v.* Minister of National Revenue	[1930] Can. Ex. R. 59	442
Fletcher *v.* Krell	28 L. T. 105	165
Foggitt, Jones & Co., Ld. *v.* State of New South Wales	(1916) 21 C. L. R. 357	545
Food Controller *v.* Cork	[1923] A. C. 647	368
Foreman and Ellams, Ld. *v.* Federal Steam Navigation Company	[1928] 2 K. B. 424	343

		PAGE
Fort Frances Pulp and Power Company *v.* Manitoba Free Press Company	[1923] A. C. 695	60
Fox *v.* Robbins	(1909) 8 C. L. R. 115	547
Foy *v.* Prentice	1 C. B. 828	57
Francis *v.* Cockrell	L. R. 5 Q. B. 501	569
Fraser *v.* City of Fraserville	[1917] A. C. 187	113
Fry *v.* Salisbury House Estate, Ld.	[1930] A. C. 432	407

G.

Galloway *v.* Galloway	30 Times L. R. 531	165
Garnant Anthracite Collieries *v.* Rees	[1912] 3 K. B. 372	4
George *v.* Skivington	L. R. 5 Ex. 1	562
Gidden *v.* Mills	[1925] 2 K. B. 713	678
Gilbert, In re	[1898] 1 Q. B. 282	368
Gill *v.* McDowell	[1903] 2 I. R. 463	165
Gillett (E. W.) & Co. *v.* Lumsden	[1905] A. C. 601	106
Glasgow Assessor *v.* Henderson & Co.	1932 S. L. T. 145	674
Glenboig Union Fireclay Company *v.* Commissioners of Inland Revenue	12 Tax Cas. 427	442
Gliksten (J.) & Son, Ld. *v.* Green	[1928] 2 K. B. 193; [1929] A. C. 381	441, 447
Glossop *v.* Ashley	[1922] 1 K. B. 1	678
Glynn *v.* Margetson & Co.	[1893] A. C. 351	329
Gompertz *v.* Bartlett	2 E. & B. 849	165
Good, In re	[1905] 2 Ch. 60	651
Gordon *v.* M'Hardy	6 F. 210	604
Gorrissen's Case	L. R. 8 Ch. 507	737
Grand Trunk Railway of Canada *v.* Attorney-General of Canada	[1907] A. C. 65	521
Great West Saddlery Company *v.* The King	[1921] 2 A. C. 91	309, 319
Groenvelt *v.* Burwell	1 Ld. Raym. 454	114
Grosvenor and West-End Railway Terminus Hotel Company	76 L. T. 337	398
Grote *v.* Chester and Holyhead Railway	2 Ex. 251	586
Guinness (Arthur) Son & Co. *v.* Commissioners of Inland Revenue	[1923] 2 Ir. R. 186	442
Gurney *v.* Womersley	4 E. & B. 133	219
Guthrie *v.* Walrond	22 Ch. D. 573	240

H.

Hadley *v.* Baxendale	9 Ex. 341	455
Haigh *v.* Kaye	L. R. 7 Ch. 469	729
Halsey *v.* Brotherhood	43 L. T. 366	198
Harris, In re	[1914] 2 Ch. 395	367
——— *v.* Pepperell	L. R. 5 Eq. 1	165
Haskins *v.* Lewis	[1931] 2 K. B. 1	678
Hawkins *v.* Smith	12 Times L. R. 532	585
Healey *v.* Société Anonyme Française Rubastic	[1917] 1 K. B. 946	162
Heaven *v.* Pender	11 Q. B. D. 503	562
Henley, In re	9 Ch. D. 469	368
Heywood, In re	[1897] 2 Ch. 593	381

		PAGE
Hick *v.* Raymond	[1893] A. C. 22	335
Hilder *v.* Dexter	[1902] A. C. 474	737
Hilliard *v.* Cox	1 Ld. Raym. 562	240
Hines *v.* Eastern Counties Farmers' Co-operative Association, Ld.	[1931] A. C. 446, 456	664
Hodge *v.* The Queen	9 App. Cas. 117	528
Hodge & Sons *v.* Anglo-American Oil Company	12 Ll. L. Rep. 183	595

I.

Ince Hall Rolling Mills Company, In re	23 Ch. D. 545*n.*	738
Income Tax Commissioners for Special Purposes *v.* Pemsel	[1891] A. C. 531	651
Initiative and Referendum Act, In re	[1919] A. C. 935	532
Inland Revenue Commissioners *v.* Blott	[1921] 2 A. C. 171	684
—— *v.* Muller & Co.'s Margarine, Ld.	[1900] 1 Q. B. 310; [1901] A. C. 217	240
—— *v.* Newcastle Breweries	12 Tax Cas. 927	442
—— *v.* Sansom	[1921] 2 K. B. 492	684
—— *v.* Yorkshire Agricultural Society	13 Tax Cas. 58	651
Inland Revenue Officer *v.* Gunn, Collie & Topping	1930 S. C. 389	665
Institution of Civil Engineers *v.* Inland Revenue Commissioners	[1932] 1 K. B. 149	651
Insurance Act of Canada, In re	[1932] A. C. 41	548

J.

James *v.* State of South Australia	(1927) 40 C. L. R. 1	542
James Morrison & Co., Ld. *v.* Shaw, Savill and Albion Co., Ld.	[1916] 2 K. B. 783	331
John Deere Plow Company *v.* Wharton	[1915] A. C. 330	45, 58, 319
Johnson Brothers & Co. *v.* Inland Revenue Commissioners	[1919] 2 K. B. 717	684
Jones *v.* Commonwealth Court of Conciliation and Arbitration	[1917] A. C. 528	542

K.

Kaye *v.* Eyre Brothers, Ld.	[1931] A. C. 446, 451	663
Kemp *v.* Dougall and Darngavil Coal Company	1909 S. C. 1314	602
Kennedy *v.* Panama, New Zealand and Australian Royal Mail Company	L. R. 2 Q. B. 580	162
Kettlewell *v.* Watson	21 Ch. D. 685; 26 Ch. D. 501	715, 731
King's Settlement, In re	[1931] 2 Ch. 294	729
Krans, Ex parte	1 B. & C. 258	81
Krell *v.* Henry	[1903] 2 K. B. 740	167

L.

		PAGE
Langridge *v.* Levy	2 M. & W. 519; 4 M. & W. 337	565
Lawson *v.* Interior Tree, Fruit and Vegetable Committee of Direction	[1931] S. C. R. 357	58, 309
Laycock, In re	[1919] 1 Ch. 241	378
Lee *v.* Nuttall	12 Ch. D. 61	367
Lehmann's Application, In re	35 R. P. C. 92	134
Le Lievre *v.* Gould	[1893] 1 Q. B. 491	565
Leng, In re	[1895] 1 Ch. 652	367
Levack *v.* Samson	(1925) Q. R. 41 K. B. 134	109
Licensed Victuallers' Mutual Trading Association. Ex parte Audain	42 Ch. D. 1	735, 745
Livingstone *v.* Rawyards Coal Company	5 App. Cas. 25	457
London and Mashonaland Exploration Company *v.* New Mashonaland Exploration Company	[1891] W. N. 165	195
Longmeid *v.* Holliday	6 Ex. 761	565
Lower St. Lawrence Power Company *v.* L'Immeuble Landry	[1926] S. C. R. 655	425
Luscar Collieries *v.* McDonald	[1927] A. C. 925	309
Lydney and Wigpool Iron Ore Company *v.* Bird	33 Ch. D. 85	738
Lyle and Kinahan's Application, In re	24 R. P. C. 249	134

M.

McArthur (W. & A.), Ld. *v.* State of Queensland	(1920) 28 C. L. R. 530	545
McCawley *v.* The King	(1918) 26 C. L. R. 9; [1920] A. C. 691	529
M'Dougall *v.* Summerlee Iron Company	1927 S. C. (H. L.) 72	3
McDowell's Application, In re	43 R. P. C. 313; [1927] A. C. 632	132
McDowell *v.* Standard Oil Company	43 R. P. C. 313; [1927] A. C. 632	132
M'Gowan *v.* Barr & Co., Ld.	1929 S. C. 461	562
Mackay *v.* Dick	6 App. Cas. 251	164
MacLeod *v.* Attorney-General for New South Wales	[1891] A. C. 455	546, 547
MacPherson *v.* Buick Motor Company	217 N. Y. 382	577
Maeder's Application, In re	[1916] 1 Ch. 304; 33 R. P. C. 77	134
Marlborough (Duke of), In re	[1894] 2 Ch. 133	729
Marpesia (The)	L. R. 4 P. C. 212	694
Martin *v.* Nadel	[1906] 2 K. B. 26	240
Matamajaw Salmon Club *v.* Duchaine	[1921] 2 A. C. 426	425
Maudslay, Sons & Field, In re	[1900] 1 Ch. 602	240
May, In re	45 Ch. D. 499	367
—— *v.* Platt	[1900] 1 Ch. 616	165
Melhado *v.* Porto Alegre, etc., Railway Company	L. R. 9 C. P. 503	738
Mercer *v.* Attorney-General for Ontario	5 Can. S. C. R. 538	30
Merchant Prince (The)	[1892] P. 179	694
Metropolitan Coal Consumers' Association *v.* Scrimgeour	[1895] 2 Q. B. 604	738
Metropolitan Properties Company, Ld. *v.* Dunham	14 Tax Cas. 740	357

		PAGE
Metropolitan Water Board *v.* Dick Kerr	[1918] A. C. 119	226
Minister of Finance *v.* Smith	[1927] A. C. 193	518
Mitford *v.* Reynolds	1 Ph. 185	652
Montreal City *v.* Drummond	1 App. Cas. 384	114
—— *v.* Montreal Harbour Commissioners	[1926] A. C. 299	100
—— *v.* Montreal Street Railway	[1912] A. C. 333	60, 305
Montreal Light, Heat and Power Company *v.* Chambly Basin	(1915) 24 Dom. L. R. 665	425
Montreal Light, Heat and Power Consolidated *v.* City of Westmount	[1926] S. C. R. 515	423
Moon *v.* London County Council	[1931] A. C. 151	665
Moore *v.* Stewarts & Lloyds, Ld.	8 F. 1129	684
Morgengry (The) and The Blackcock	[1900] P. 1	473, 493
Morin *v.* Commissaires d'Ecoles de Ste. Euphemie	(1920) Q. R. 60 S. C. 76	426
Morrison (James) & Co., Ld. *v.* Shaw, Savill, and Albion Co., Ld.	[1916] 2 K. B. 783	331
Mullen *v.* Barr & Co., Ld.	1929 S. C. 461	562
Muller & Co.'s Margarine, Ld. *v.* Inland Revenue Commissioners	[1900] 1 Q. B. 310; [1901] A. C. 217	250
Municipalité Scolaire de la Cité de Lachine *v.* Great Northern Western Telegraph Company	(1919) Q. R. 56 S. C. 215	426
Municipalité Scolaire St. Charles-Bas-du Sault *v.* Gaunt	(1921) Q. R. 60 S. C. 360	426

N.

Nelson, Ex parte [No. 1]	(1928) 42 C. L. R. 209	545
—— In re [No. 2]	(1929) 42 C. L. R. 258	545
New South Wales (State of) *v.* The Commonwealth	(1915) 20 C. L. R. 54	542
New York Life Insurance Company *v.* Public Trustee	[1924] 2 Ch. 101	240
Noad *v.* Murrow	40 L. T. 100	198
Nocton *v.* Ashburton	[1914] A. C. 932	198
Notara *v.* Henderson	L. R. 7 Q. B. 225	330
Norwich Union Life Insurance Society *v.* Embleton	137 L. T. 415; 11 Tax Cas. 681	357
Nunn *v.* Barlow	1 Sim. & St. 588	376

O.

O'Dell *v.* Gregory	24 Can. S. C. R. 661	107
O'Hanlan *v.* Logue	[1906] 1 I. R. 247	651
Okill *v.* Whittaker	1 De G. & Sm. 83; 2 Ph. 338	165
Oliver *v.* Hinton	[1899] 2 Ch. 264	715
—— *v.* Saddler & Co.	[1929] A. C. 584	585
Ooregum Gold Mining Company of India *v.* Roper	[1892] A. C. 125	736

P.

Paget *v.* Marshall	28 Ch. D. 255	165
Peterson *v.* The Queen	2 Can. Ex. R. 67	290
Phelps, James & Co. *v.* Hill	[1891] 1 Q. B. 605	330

		PAGE
Phillips *v.* Foxall	L. R. 7 Q. B. 666	165
Pickering *v.* Rudd	4 Camp. 219	57
Pierreville (Village of) *v.* Bell Telephone Company	(1915) 23 Dom. L. R. 635	425
Plaskynaston Tube Company, In re	23 Ch. D. 542	738
Pope & Pearson *v.* Buenos Ayres New Gas Company	8 Times L. R. 516	165
Powell *v.* Apollo Candle Company	10 App. Cas. 282	528
—— *v.* Birmingham Vinegar Brewery Company	[1893] 2 Ch. 388; [1894] A. C. 8	132
Powell's Trade Mark, In re	[1893] 2 Ch. 388; [1894] A. C. 8	132
Pritchard *v.* William Lewis & Sons	[1931] 1 K. B. 386	672
Proprietary Articles Trade Association *v.* Attorney-General for Canada	[1931] A. C. 310	58, 320
Prout *v.* Hunter	[1924] 2 K. B. 736	678
Public Trustee *v.* Smith. In re Smith	[1932] 1 Ch. 153	652

Q.

Quesnel Forks Gold Mining Company *v.* Ward	[1920] A. C. 222	277

R.

Ramsden *v.* David Sharratt & Sons, Ld.	35 Com. Cas. 314	165
Reddie *v.* Williamson	1 M. 228	627
Reg. *v.* Ashforth	8 Times L. R. 283	79
—— *v.* Burah	3 App. Cas. 889	528
—— *v.* Coote	L. R. 4 P. C. 599	121
—— *v.* Levauder	13 Cox C. C. 329	79
—— *v.* St. George's Union	L. R. 7 Q. B. 90	357
Regulation and Control of Aeronautics in Canada, In re	[1932] A. C. 54	305
Rex *v.* Attorney-General for British Columbia	[1924] A. C. 213	99
—— *v.* Canadian Northern Railway Company	[1923] A. C. 714	517
—— *v.* Cook	3 T. R. 519	517
—— *v.* Faversham Fishermen's Company	8 T. R. 352	60
—— *v.* Lovitt	[1912] A. C. 212	240
—— *v.* Marks	3 East, 157	81
—— *v.* Nat Bell Liquors, Ld.	[1922] 2 A. C. 128	320
—— *v.* Paulson	[1921] 1 A. C. 271	277
—— *v.* Smithers	(1912) 16 C. L. R. 99	547
Rhoades, In re	[1899] 2 Q. B. 347	368
Richard Evans & Co., Ld. *v.* Scahill	20 B. W. C. C. 348	12
Richards *v.* Butcher	[1891] 2 Ch. 522	130
Rimmer *v.* Webster	[1902] 2 Ch. 163	715
Roberts *v.* Hopwood	[1925] A. C. 578	684
Roe *v.* Russell	[1928] 2 K. B. 117	678
Roughley *v.* State of New South Wales	(1928) 42 C. L. R. 162	545
Royal Bank of Canada *v.* The King	[1913] A. C. 283	309
—————— *v.* Larue	[1928] A. C. 187	516
Royal Trust Company *v.* Attorney-General for Alberta	[1930] A. C. 144	239

		PAGE
Royal Trust Company *v.* City of Montreal	57 Can. S. C. R. 352	118
Rumsey *v.* North Eastern Railway Company	14 C. B. (N. S.) 641	277
Russell *v.* The Queen	7 App. Cas. 829	60
——— *v.* Town and County Bank, Ld.	13 App. Cas. 418	408
Rustomjee *v.* The Queen	1 Q. B. D. 487 ; 2 Q. B. D. 69	14
Ryan *v.* Cunningham	Appeal admitted Oct., 1930	109
Ryder *v.* Wombwell	L. R. 4 Ex. 32	696

S.

St. Catherine's Milling and Lumber Company *v.* The Queen	14 App. Cas. 46	30
St. Marylebone Assessment Committee *v.* Consolidated London Properties, Ld.	[1914] A. C. 870	357
Salaman *v.* Secretary of State for India	[1906] 1 K. B. 613	21
Samson, In re	[1906] 2 Ch. 584	367
Savona (The)	[1900] P. 252	330
School Commissioners of Westmount *v.* Galarneau	(1912) Q. R. 44 S. C. 385	426
Scott *v.* Coulson	[1903] 1 Ch. 453 ; [1903] 2 Ch. 249	164, 206
Servini, Ex parte	[1914] 1 K. B. 77	79
Seymour *v.* Reed	[1927] A. C. 554	389
Shaw *v.* Bentley & Co. and Yorkshire Breweries, Ld.	68 L. T. 812	738
Shell Company of Australia *v.* Federal Commissioner of Taxation	[1931] A. C. 275	122
Sherbrooke Gas and Water Company *v.* City of Sherbrooke	(1891) 15 Legal News (Montreal) 22	424
Ship's Case	2 De G. J. & S. 544	219
Shore *v.* Wilson	9 Cl. & F. 355	727
Short Brothers, Ld. *v.* Commissioners of Inland Revenue	12 Tax Cas. 955	442
Skinner *v.* Geary	[1931] 2 K. B. 546	678
Smelting Company of Australia, Ld. *v.* Inland Revenue Commissioners	[1897] 1 Q. B. 175	238
Smith, In re. Public Trustee *v.* Smith	[1932] 1 Ch. 153	652
——— *v.* Hughes	L. R. 6 Q. B. 597	164, 207
Southern Rhodesia, In re	[1919] A. C. 211	32
Spurling *v.* Pugh	Estates Gazette, June 12, 1926	678
Stamp Commissioner *v.* Hope	[1891] A. C. 476	240
Stanley *v.* National Fruit Company	24 Saskat. L. R. 137	698
Stephens *v.* Junior Army and Navy Stores, Ld.	[1914] 2 Ch. 516	292
Street *v.* Blay	2 B. & Ad. 456	220
Strickland *v.* Turner	7 Ex. 208	165
Swabey *v.* Port Darwin Gold Mining Company	1 Meg. 385	172
Swiss Bank Corporation *v.* Boehmische Industrial Bank	[1923] 1 K. B. 673	240

T.

		PAGE
Tamplin (F. A.) Steamship Company *v.* Anglo-Mexican Petroleum Products Company	[1916] 2 A. C. 397	167
Tannoch *v.* Brownieside Coal Company	[1929] A. C. 642; 1929 S. C. (H. L.) 127	3
Taylor *v.* Attorney-General of Queensland	(1917) 23 C. L. R. 457	529
——— *v.* Caldwell	3 B. & S. 826	165
Teutonia (The)	L. R. 4 P. C. 171	329
Thomas *v.* Winchester	6 N. Y. 397	564
Toronto Corporation *v.* Bell Telephone Company of Canada	[1905] A. C. 52	309
Toronto Electric Commissioners *v.* Snider	[1925] A. C. 396	60
Toronto General Trusts Corporation *v.* The King	[1919] A. C. 679	240
Towle *v.* Improved Industrial Dwellings Company	[1931] 1 K. B. 263	355
Trade Mark of La Société Anonyme des Verreries de l'Etoile, In re	[1894] 2 Ch. 26; 10 R. P. C. 436	132
Trigge *v.* Lavallée	15 Moo. P. C. 270	165
Trusts and Guarantee Company *v.* The King	54 Can. S. C. R. 107	30
Turner *v.* Carlton	[1909] 1 K. B. 932; 5 Tax Cas. 395	358
——— *v.* Cuxon	22 Q. B. D. 150	391
Turpin *v.* Middlesbrough Assessment Committee	[1931] A. C. 446, 451	663
Tyrone (Earl of) *v.* Marquis of Waterford	1 D. F. & J. 613	240

U.

Union Colliery Company *v.* Bryden	[1899] A. C. 580	49
Upton *v.* Townend	17 C. B. 30	678
Urban *v.* Inland Revenue Commissioners	29 Times L. R. 141	240
Usher's Wiltshire Brewery, Ld. *v.* Bruce	[1915] A. C. 433	407, 684

V.

Vacher & Sons *v.* London Society of Compositors	[1913] A. C. 107	547
Valin *v.* Langlois	3 Can. S. C. R. 1; 5 App. Cas. 115	114
Velazquez, Ld. *v.* Inland Revenue Commissioners	[1914] 2 K. B. 404; 3 K. B. 458	238, 240
Vere *v.* Jeffries	3 Dyer 305*a*, *n.*, and *see* 4 Leon. 211	239
Verge *v.* Somerville	[1924] A. C. 496	652

W.

		PAGE
Wallace *v.* Dixon	[1917] 2 I. R. 236	666
Ward & Co., Ld. *v.* Tax Commissioners	[1923] A. C. 145	684
Waters and Watercourses, Reference re	[1929] S. C. R. 200	100
Webber *v.* Oldfield	[1898] 1 I. R. 431	652
Weld-Blundell *v.* Stephens	[1920] A. C. 956	565
West *v.* Kansas Natural Gas Company	221 U. S. 229	547
West Rand Central Gold Mining Company *v.* The King	[1905] 2 K. B. 391	21
Westmount (School Commissioners) *v.* Galarneau	[1912] Q. R. 44 S. C. 385	426
Westmount (Town of) *v.* Montreal Light, Heat and Power Company	(1911) 44 Can. S. C. R. 364	424
Wheat Case	*See* New South Wales, State of *v.* The Commonwealth.	
White *v.* Steadman	[1913] 3 K. B. 340	616
Wilkinson *v.* Sibley	[1932] 1 K. B. 194	666
Williams *v.* Sanders	[1927] 2 K. B. 498; 11 Tax Cas. 673	357
Winnipeg Electric Railway Company *v.* City of Winnipeg	30 Dom. L. R. 159	114
Winterbottom *v.* Wright	10 M. & W. 109	565, 566
Woodward *v.* Darcy	Plow. 184	368
Worthington & Co.'s Trade Mark	14 Ch. D. 8	132

Y.

Yeomans *v.* Bradshaw	Carthew, 373	240

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

CONNOR . . . . APPELLANT; H. L. (Sc.)*

AND 1931

CADZOW COAL COMPANY, LIMITED . RESPONDENTS. Oct. 19.

Workmen's Compensation—Total Incapacity—Industrial Disease—Certificate that Workman had not completely recovered in respect that he was more susceptible to the Disease than before the attack—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4; *s.* 43.

The Workmen's Compensation Act, 1925, enacts by s. 9, sub-s. 4: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity. . . ."

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

H. L. (Sc.)
1931
CONNOR
v.
CADZOW
COAL CO.

A miner, who had been disabled by miners' nystagmus and was receiving compensation, was certified by the medical referee to have recovered and to be fit for his ordinary work. His employers lodged a minute craving the Sheriff-Substitute to end the compensation. In reply the workman lodged a minute in which he averred that he had not completely recovered from the disablement in respect that that attack of the disease left him less immune from a further attack, and that the risk of recurrence so engendered was wholly or mainly responsible for his failure to obtain work, and asked to be allowed a proof of these averments.

The Sheriff-Substitute, founding on s. 9, sub-s. 4, refused to end compensation and allowed the workman a proof of his averments. The Second Division of the Court of Session, treating the certificate of the medical referee as a certificate of complete recovery, held that the compensation fell to be ended.

The workman appealed, and after his case had been opened the House remitted the matter to the Court of Session to ascertain from the medica referee whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it. The medical referee having answered this question in the negative :—

Held, that s. 9, sub-s. 4, of the Act applied to industrial diseases and that the appellant was entitled to have his averments admitted to probation.

Interlocutor of the Second Division of the Court of Session in Scotland, 1930 S. C. 840, reversed.

WORKMAN'S APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Ormidale, Lord Hunter, and Lord Anderson) (1) reversing a determination of the Sheriff-Substitute of Lanarkshire in an arbitration under the Workmen's Compensation Act, 1925. The facts are stated in the opinion of Lord Thankerton and are summarized in the headnote.

After the arguments in support of the appeal had been concluded on March 23, 1931, the House, not being satisfied as to the meaning of the certificate of the medical referee, remitted the case to the Court of Session with a direction to remit to the arbitrator to obtain from the medical referee the answer to the question set out in the headnote, and, on receiving his answer, the case was set down for further hearing.

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(1) 1930 S. C. 840.

1931. July 13. LORD BUCKMASTER said that their Lordships would first hear the counsel for the respondents.

John Carmont K.C. (of the Scottish Bar) (with him *James Marshall* (of the Scottish Bar) and *H. W. Beveridge* (of the English Bar)) for the respondents. Sect. 9, sub-s. 4, of the Act is not applicable to the circumstances of this case even with the supplementary report of the medical referee. That provision does not cover the case of a man who is fit for employment of all kinds. It has in view the case of a man who is still physically incapacitated and only able to do work of a certain kind and who is unable to get work because of his partial incapacity. The appellant does not come within that provision because he is really a recovered man, though he has the traces of the disease in him, and the reason why he cannot get work is the resolve of the employers not to employ any miner who has suffered from miners' nystagmus. Sect. 9, sub-s. 4, postulates a man who is only partly able to do his work. *Tannoch* v. *Brownieside Coal Co.* (1) is distinguishable, first, because there the man was suffering from a physical disability by reason of his obvious blindness, and, secondly, because that was not a case of industrial disease. In the respondents' submission s. 9, sub-s. 4, has no application to industrial diseases, which are dealt with in an artificial manner in a self-contained code comprising ss. 43 and 44 of the Act. Under s. 43 each disablement caused by the disease must be treated as a fresh accident without regard to the fact that the disease may have been continuously present: *M'Dougall* v. *Summerlee Iron Co.* (2); *Brown* v. *William Dixon, Ld.* (3)

Sir Matthew Fraser K.C. (with him *D. P. Blades*) (both of the Scottish Bar) for the appellant. The result of the amended certificate is to bring the appellant within *Tannoch's* case. (1) *M'Dougall's* case (2) is distinguishable, because the original disablement was settled and compensated for and therefore the miner had to apply for a new certificate.

(1) [1929] A. C. 642; 1929 S. C. (H. L.) 127.

(2) 1927 S. C. (H. L.) 72.

(3) 1929 S. C. 206, 211.

Brown's case (1) was not concerned with s. 9, sub-s. 4, at all. There is no ground for suggesting that that provision does not apply to industrial diseases. In *Garnant Anthracite Collieries* v. *Rees* (2) a miner who had recovered from an attack of nystagmus in the sense that he was able to do his work was held entitled to compensation by reason of his increased susceptibility to the disease owing to his previous attack.

Lord Buckmaster. Their Lordships will reserve their opinions, but they think that the Court of Session was in error and that the arbitrator was right. As the workman has not been receiving compensation since September 25, 1929, I will put the question immediately.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and determination of the Sheriff-Substitute of Lanarkshire restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Courts below and the costs of the appeal to this House.

Lords' Journals, July 13, 1931.

1931. Oct. 19. Lord Buckmaster. My Lords, I have had the opportunity of reading the opinion expressed by Lord Thankerton, and my agreement with its recital of facts and conclusions of law renders it unnecessary to examine once more in detail the circumstances of the case. I agree also with the arguments of the Court of Session, but for reasons which I will briefly explain, I think these were based on imperfect premises.

Miners' nystagmus is a disease to which men working underground are liable in varying degrees of susceptibility; some appear to be immune, but many are not so fortunate, and the fear of this unknown and undiscovered susceptibility has led mine owners to require a statement that a man has not suffered from the illness as a condition precedent to entering their employment.

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(1) 1929 S. C. 206.

(2) [1912] 3 K. B. 372.

If a man has once been attacked, and has completely recovered, recurrence of the disease would be due to his original susceptibility, but if the recovery be not complete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away.

In the case of a complete recovery, the second attack must be regarded as an independent accident, and this is made plain in the judgment of Lord Warrington in the case of *M'Dougall.* (1) In the present case all the learned judges in the Court of Session regarded the report of the medical referee as establishing a case of complete recovery, and, had this hypothesis been correct, their conclusions were covered by authority.

It appeared, however, to your Lordships that the certificate did not necessarily bear that meaning. It stated that the man had recovered from the attack, and that his condition was such that he was fit for his ordinary work. But it did not state that the attack itself had not rendered him liable to a recurrence of the disease.

The matter was therefore referred to the arbitrator, with a direction to obtain from the medical referee an answer to the following question: Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it; and his answer was in the following words: "In obedience to the foregoing remit I have to state that my answer is in the negative."

This answer prevents the certificate from having the effect attributed to it by the Court of Session and leaves open the question whether after the ordinary symptoms have passed away and recovery appears to have taken place, it might

(1) 1927 S. C. (H. L.) 72.

not still be the fact that exposure to the same conditions would cause the illness immediately to recur. In these circumstances complete recovery cannot be asserted.

If this be once accepted, the rest is merely a matter of degree. There comes a moment when, for all purposes connected with his occupation, the effect of the original attack has completely passed away, and the man is, in relation to liability, in the same position as he was before the original attack occurred. When this happens recovery is complete, but in my judgment that has not been established in the present case, and I think that the arbitrator was right in the view that he took that the averments were sufficient to permit the claimant to go to proof and in his refusal to end the right to compensation as on September 25, 1929.

With this opinion of mine I am desired to express the concurrence of my noble friend, Lord Dunedin.

LORD WARRINGTON OF CLYFFE. My Lords, the facts of this case may be briefly stated.

The appellant, a miner, was on February 14, 1928, disabled by the industrial disease, miners' nystagmus, while in the employment of the respondents. The respondents admitted liability, and compensation was paid on the footing of total incapacity.

On two separate occasions the appellant was certified to be fit for work on the surface, and was thereafter paid compensation on the footing of partial incapacity.

On September 25, 1929, he was certified by the medical referee to have recovered from his attack of miners' nystagmus and to be fit for his ordinary work.

Thereupon the respondents ceased as from the last-mentioned date to pay compensation, and in due course lodged a minute craving the arbitrator to end the man's compensation as from the same date.

In reply the appellant craved the arbitrator to refuse the craves of the respondents' minute, making certain averments, which I need not state in detail. It is enough to say that they raised a case which, if established, might bring the case within s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, if such section were, as he alleged, applicable to the case. He claimed that he should still be regarded as disabled and suffering from a state of incapacity by reason of his having contracted the disease, and was entitled to an award of compensation in respect of his continued incapacity.

The appellant moved for an allowance of proof of the averments in his minute. This was opposed by the respondents, who further asked the arbitrator to end the appellant's right to compensation as from September 25, 1929. The arbitrator refused hoc statu to end the right to compensation, and allowed a proof.

He was asked to state a case, and submitted two questions of law for the opinion of the Court—namely: "(1.) Was I entitled to allow the claimant a proof of the averments contained in his minute? (2.) Was I bound to end the claimant's right to compensation as at September 25, 1929?"

On June 19, 1930, their Lordships of the Second Division pronounced an interlocutor whereby they answered the first question in the negative and the second in the affirmative, and sustained the respondents' appeal from the arbitrator. The present appeal is from that interlocutor.

The appeal was opened to this House on March 10, 1931. Your Lordships, feeling some doubt as to the true meaning of the medical referee's certificate, remitted the matter to the Court of Session with a view to obtaining from the medical referee an answer to the following question: "Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it?" The medical referee has answered the question by stating that "my answer is in the negative." That is to say he did not intend by his certificate to certify that the man had completely recovered from the attack in the sense mentioned in the question.

On these partly fresh materials the appeal now comes before the House for decision.

It has been determined in this House that in s. 9, sub-s. 4, the words "employment of a certain kind" include the workman's employment at the time of the injury: *Tannoch* v. *Brownieside Coal Co.* (1) It was argued on behalf of the respondents that s. 9, sub-s. 4, cannot apply to the particular form of injury by accident disablement by industrial disease. On this point I agree with what obviously would have been the opinion of the Lord Justice-Clerk if he had felt himself bound to decide the question. He says: "Had it been intended to exclude the application of s. 9, sub-s. 4, to industrial diseases nothing would have been simpler than that the Legislature should have said so. They have not said so." I have no hesitation in adopting this argument, and I think it is conclusive against the contention referred to.

Their Lordships in the Court of Session plainly proceeded on the footing that the certificate was one of complete recovery in the fullest sense, and that it was conclusive and could not be questioned by evidence, and on that ground refused to allow the proof, relying on *Burrows* v. *Wilsons and Clyde Coal Co.* (2) On the materials now before the House the certificate is not one of complete recovery in the full sense, and in my opinion, s. 9, sub-s. 4, being applicable, if the evidence brings the case within it, the workman ought to be allowed a proof, and it follows that until that proof has been held the arbitrator was not bound to end the right to compensation.

The respondents relied upon *M'Dougall's* case (3), but in my opinion this causes no difficulty. The workman had there been disabled by nystagmus, he had been fully compensated by payment of a lump sum and had been certified as having completely recovered. He was again attacked by the disease and obtained a fresh certificate of disablement. All that this House decided was that this disablement was a fresh injury by accident, and I cannot see that this has any bearing on the present case.

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(1) [1929] A. C. 642.

(2) [1929] A. C. 651; 1929 S. C. (H. L.) 133.

(3) 1927 S. C. (H. L.) 72.

Whether the appellant can bring his case within s. 9, sub-s. 4, depends, of course, upon the nature of his proof, and I express no opinion upon any hypothetical question which may arise thereon.

In my judgment the appeal should be allowed with costs here and below, and the questions should be answered the first in the affirmative and the second in the negative.

Lord Thankerton (read by Lord Russell of Killowen). My Lords, on September 6, 1928, the appellant was disabled by miners' nystagmus while in the employment of the respondents as a coal-cutting machineman. The respondents admitted liability and paid him as for total incapacity until October 17, 1928, when he was certified by the medical referee as fit for light work on the surface and was thereafter paid compensation as for partial incapacity.

On September 25, 1929, the appellant was certified by the medical referee to have recovered from his attack of miners' nystagmus and to be fit for his ordinary work, and the respondents then presented a minute craving the Court to end the right to compensation as on that date. In reply the appellant lodged a minute opposing the respondents' motion, and in his minute the appellant made certain averments, which he sought to have remitted to probation. The learned Sheriff-Substitute allowed a proof, and, on the requisition of the respondents, stated a case for the Court of Session, in which the questions of law were: "(1.) Was I entitled to allow the claimant a proof of the averments contained in his minute? (2.) Was I bound to end the claimant's right to compensation as at September 25, 1929?" On June 19, 1930, the Second Division of the Court of Session sustained the appeal, and answered the first question in the negative and the second question in the affirmative. The present appeal is from that interlocutor.

The averments now founded on by the appellant are set out in articles 1, 3 and 4 of his minute and are as follows:—

"1. That he is not able to earn full wages at his employment and has not ceased to be incapacitated as a result of the said attack of miners' nystagmus, and has searched diligently for, and failed to obtain employment, and such failure to obtain employment is by reason wholly or mainly on account of his having contracted the said disease of miners' nystagmus.

3. That it is averred and admitted that, in the mining industry, a workman who has suffered from and been paid compensation for the disease of miners' nystagmus, is, even though he be certified as recovered, precluded by employers from entering employment in the mining industry underground. The claimant's earning power has been lessened and the scope of his employment has been diminished in consequence of his being so precluded from entering the mining industry underground.

4. That under the circumstances above stated the claimant should still be regarded as disabled and suffering from a state of incapacity by reason of his having contracted the said disease known as miners' nystagmus, and is entitled to an award of compensation in respect of his continued disablement and incapacity."

By these averments the appellant seeks to bring his case within the terms of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, which is as follows:—

"If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act: Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit."

The main ground for the decision of the learned judges of the Second Division of the Court of Session against the appellant rested on the view that the certificate of the medical referee, which by s. 19, sub-s. 3, of the Act is declared to be final both as to the condition of the workman and his fitness for employment, meant to certify that the workman had completely recovered from the disablement by industrial disease previously certified as having occurred on February 14, 1928. Lord Ormidale says: "It is quite impossible to spell out of the certificate the recognition by the referee in the workman's condition of any remanet of the disease. That being so, keeping in view what was said in the case of *Burrows* v. *Wilsons and Clyde Coal Co.* (1) of the finality of a medical referee's certificate (if it be free from ambiguity), the arbitrator was not, in my opinion, entitled to allow a proof of averments which, as I read them, go to contradict the tenor and effect of the certificate in question."

My Lords, while the medical referee's certificate is not itself set out in the stated case, the parties were content to take it as sufficiently narrated in para. 7 of the stated case in these words: "The said medical referee certified to the Court that the claimant had recovered from the attack of miners' nystagmus and that his condition was such that he was fit for his ordinary work." In *Burrows'* case (1) the medical referee reported that the workman had "completely" recovered and was fit for his ordinary work.

The averments, already set out above, which the appellant asks to be remitted to probation, are not well drawn but, in my opinion, they sufficiently aver that the appellant has not completely recovered from the disablement of February 14, 1928, in respect that that attack of the disease has left him less immune from a further attack and that the risk of recurrence so engendered is wholly or mainly responsible for his failure to obtain work. On the other hand, if the said attack now merely affords evidence of a constitutional susceptibility to the disease, any recurrence would be due to the latter and not to the attack of February, 1928, and would constitute a fresh disablement.

(1) [1929] A. C. 651; 1929 S. C. 133.

On the first hearing of this appeal and at the close of counsel's opening arguments on behalf of the appellant, it was felt desirable to ascertain whether the medical referee intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after, and in consequence of, the attack more susceptible to the disease than he had been before it, and the case was remitted to the Court of Session for this purpose; the medical referee replied in the negative, and at the resumed hearing both parties were agreed that the certificate must be taken as meaning that the workman is now left more susceptible to the disease than he was before the attack of Februrary 14, 1928. It follows that the workman has not completely recovered from that disablement and the case is at once distinguishable from *Burrows*' case.

But counsel for the respondents maintained that s. 9, sub-s. 4, did not apply to cases of industrial disease and that the words "who has so far recovered from the injury as to be fit for employment of a certain kind" applied only to physical incapacity for work. He further argued that a recurrent attack of industrial disease, which disables a workman, must constitute a fresh disablement and he founded on the cases of *M'Dougall* v. *Summerlee Iron Co.* (1) and *Brown* v. *William Dixon, Ld.* (2) But in both these cases the original disablement had ceased before the second attack occurred. In the present case the certificate does not establish that the disablement has ceased, and if the appellant were to be disabled by a fresh attack from earning full wages, the arbitrator might be entitled to hold that it was still due to the original disablement, on a view similar to that taken by this House in *Richard Evans & Co., Ld.* v. *Scahill.* (3)

I agree that there is no reason why sub-s. 4 of s. 9 should not apply to cases of industrial disease, and, in my opinion, the appellant is entitled to have his averments remitted to probation, and, on such proof being taken, the question will

(1) 1927 S. C. (H. L.) 72.
(2) 1929 S. C. 206.
(3) (1927) 20 B. W. C. C. 348.

arise as to whether the case has been brought within the terms of s. 9, sub-s. 4.

LORD RUSSELL OF KILLOWEN. For myself, agreeing as I do with the judgment which I have just read, I have thought it unnecessary to prepare any separate judgment of my own.

LORD BUCKMASTER. The question was put on the former occasion and it is not necessary to repeat it.

Agents for the appellant: *Boxall & Boxall, for John & Francis Cassells, Hamilton, and Erskine Dods & Rhind, S.S.C., Edinburgh.*

Agents for the respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)*
1931
Nov. 19.

CIVILIAN WAR CLAIMANTS ASSOCIATION, LIMITED . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

Crown—Petition of Right—War Damage—Compensation for Civilians—Treaty of Versailles—Payments by Germany—Claim that the Crown was Agent or Trustee of the Moneys received under the Treaty.

By the Treaty of Versailles (art. 232) Germany undertook to make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by the aggression of Germany and her allies, and moneys were received by the Crown under this article.

By a petition of right the suppliants, as assignees of civilian claimants who had suffered loss or damage by German aggression during the War, claimed on their behalf payment of compensation out of the moneys paid or payable as reparations under the above article. The case made by the petition was that the claimants had sent particulars of their claims, first, to the Foreign Claims Office and, afterwards, to the Reparation Claims Department in accordance with the instructions of His Majesty's Government, that these claims had been duly verified by the Government, and were included in the agreed total of claims for reparations which Germany was required to pay under the treaty, and that the Crown in inviting the claimants to submit their claims had constituted itself an agent or a trustee for the claimants in respect of any money received by it from Germany on account of reparations, and that any such money was money had and received by the Crown to the use of the claimants:—

Held, on demurrer by the Crown, that the petition afforded no ground for the contention that the money received under the treaty was received by the Crown as an agent or a trustee for the claimants, or as money had and received to their use, and was bad as disclosing no ground of claim cognizable by the Court.

Rustomjee v. *The Queen* (1876) 1 Q. B. D. 487; 2 Q. B. D. 69, approved and followed.

APPEAL from an order of the Court of Appeal affirming an order of Roche J. whereby it was ordered that judgment be entered for the Crown upon the Crown's amended demurrer to the appellants' amended petition of right.

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

By the amended demurrer the Attorney-General, on behalf of the King, gave the Court to understand and be informed that the amended petition of right was bad in substance and in law on the ground that it was not maintainable in law and disclosed no ground of claim cognizable by the Court.

The amended petition alleged that the suppliant (appellant) company, which was a company limited by guarantee and registered under the Companies Acts on March 5, 1925, was formed for the purpose of obtaining compensation for civilian sufferers who had suffered loss or damage in person or property from air raids or bombardments during the war with Germany from 1914 to 1918, and in co-operation with other classes of claimants to obtain compensation for all civilian claimants under para. 2 of art. 232 of the Treaty of Versailles (para. 1); that the appellants were assignees under certain assignments in writing dated June 30, 1928, of certain sums of money due from His Majesty to certain persons, firms or corporations (who in common with all civilian claimants under the said para. 2 of art. 232 of the Treaty of Versailles were thereinafter referred to as "the claimants"), being civilian subjects of His Majesty who had suffered injury, loss or damage during the Great War from hostile aircraft, submarines, bombardments, internment or other enemy action on the part of Germany or her allies, and that notice of these assignments had been given to His Majesty (paras. 2–7); that from time to time His Majesty's Ministers had led the claimants to believe that money would be obtained from Germany or otherwhere and used for the compensation of the claimants (para. 9), and instances were given in the succeeding paragraphs of statements of His Majesty's Ministers during the War as to the policy of the Government in relation to damage caused to civilians by enemy aggression. These statements are sufficiently referred to in the opinion of Lord Buckmaster. It was further alleged that on September 7, 1916, His Majesty issued a proclamation commanding subjects having claims against enemy Governments forthwith to make returns of their claims to the Directors of the Foreign Claims Office, and that the claimants from time to time had sent in their claims either to the Directors of the Foreign Claims Office or to other Departments of His Majesty's Government in accordance with the instructions of His Majesty's Government as announced from time to time (paras. 14, 15). Para. 22 alleged that on November 5, 1918, a memorandum of the Allied and Associated Powers, the contents of which were approved by His Majesty, was sent to the German military authorities, and quoted the following extract from the memorandum: "Further in the conditions of peace laid down in his address to Congress of the 8th January, 1918, the President of the United States of America declared that the invaded territories must be restored as well as evacuated and freed, and the Allied Governments feel no doubt ought to be allowed to exist as to what this provision implies. By it they understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land by sea and from the air." Para. 23 alleged that on the 11th day of November, 1918, an armistice between the Allied and Associated Powers and Germany was signed on the basis of the late President Wilson's fourteen points with the interpretation placed upon them by the Allied and Associated Powers. It was further alleged that on June 28, 1919, a treaty of peace known as the Treaty of Versailles was signed by the representatives of the Allied and Associated Powers, including His Majesty's Ministers acting on behalf of His Majesty (para. 29).

The petition then set out the following provisions of the treaty.

"Art. 231. The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

H. L. (E.)
1931
Civilian War Claimants Association v. The King.

Art. 232. The Allied and Associated Governments recognise that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present treaty, to make complete reparation for all such loss and damage.

The Allied and Associated Governments however require and Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land by sea and from the air and in general all damage as defined in Annex I. hereto.

Annex I. Compensation may be claimed from Germany under art. 232 above in respect of the total damage under the following categories:—

1. Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of War, including bombardments or other attacks on land, on sea or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

2. Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health) as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labour, wherever arising, and to the surviving dependents of such victims.

3. Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

8. Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

9. Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or

materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

10. Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population.

Art. 233. The amount of the above damage for which compensation is to be made by Germany shall be determined by an Inter-Allied Commission, to be called the Reparation Commission and constituted in the form and with the powers set forth hereunder and in Annexes II. to VII. inclusive hereto."

It was further alleged that on April 1, 1920, the Directors of His Majesty's Reparation Claims Department sent letters to all the claimants requesting them to send particulars of all the loss and damage respectively suffered by them during the War with a view to the preparation of the British Government claim under the Reparation parts of the Treaty of Peace, such particulars to be set out on a specified form and to be verified by a statutory declaration (paras. 37–38); and that all the claimants notified their claims to His Majesty's Government and, as and when required by His Majesty's Government, at their own expense, set out the particulars of their claims on a proper claim form duly verified by a statutory declaration, and sent them to His Majesty's Foreign Claims Office or later to the Directors of His Majesty's Reparation Claims Department for inclusion in His Majesty's claim against Germany, and that such claims were acknowledged as having been received, and at a later date were verified, by the said Reparation Claims Department (para. 46); that on February 12, 1921, the British Government on His Majesty's behalf, and on behalf of the claimants, submitted a claim which included all the claimants' claims to the Reparation Commission set up by the Treaty of Versailles and that the said claim on behalf of His Majesty's Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas amounted to

7,936,456*l.* for damage to property and 36,030,361*l.* for damage to the person of civilians (para. 47); that the whole of the claimants' claim was included in the agreed total of claims for reparations which Germany was required to pay (para. 51); and that under the Treaty of Versailles the said claims by the claimants were a preferential and prior charge on the reparations received by His Majesty from Germany (para. 52).

In paras. 53, 53A, 53B, and 53C it was alleged that certain sums had been received by His Majesty from Germany on account of reparations, and further or alternatively that sums not yet received were from time to time payable to His Majesty on account of reparations. By para. 54 the suppliants submitted that the conduct of His Majesty, through His Royal Proclamation and through His Foreign Claims Office and Reparation Claims Office and through His Prime Minister and other Ministers, in inviting the claimants to submit their claims had constituted His Majesty an agent or a trustee for the claimants in respect of any money received from Germany by His Majesty on account of reparations, and that any such money was received and held by His Majesty for and on behalf of and to the use of the claimants; and further that His Majesty was estopped from denying such agency or trust. The prayer of the petition was (so far as now material) for (1.) payment to the suppliants of the amount due to each of the claimants who had assigned their claims to the suppliants with interest; (2.) alternatively (*a*) payment to the suppliants of a rateable proportion of all sums actually received by or on behalf of His Majesty on account of reparations; and (*b*) a declaration that the suppliants were entitled to be paid a rateable proportion of the sums not yet received by or on behalf of His Majesty on account of reparations as and when so received; (3.) the costs of the petition.

Roche J. was of opinion that this case was concluded by *Rustomjee* v. *The Queen* (1), and he accordingly ordered judgment to be entered for the Crown upon the amended

(1) 1 Q. B. D. 487; 2 Q. B. D. 69.

demurrer; and the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirmed his judgment on the same ground.

Nov. 17, 19. *Serjeant Sullivan K.C.* and *Pritt K.C.* (with them *Cyril Radcliffe*) for the appellants. The appellants' submission is based on art. 232 of the Treaty of Versailles, which gave an absolute and complete undertaking by Germany to make compensation to civilians. Art. 296 is also in point in that it recognizes that compensation claimed and received in respect of injuries to a civilian subject is received by His Majesty for and on behalf of such subject. Further, before the treaty of peace a department of Government was formed for the express purpose of acting as agent or trustee for civilians who had suffered from German aggression, and that department received these claims in order to present them to Germany.

[LORD BUCKMASTER. Germany did not allocate the moneys paid as compensation to any specific claims, and there is no evidence of appropriation by His Majesty's Government after the money had been received.]

In all that relates to the making and performance of a treaty His Majesty is exercising his prerogative right, but after his prerogative right is spent he finds himself in possession of a sum of money which his Ministers have publicly stated in advance would be allocated to a specific purpose. By the consent of all parties that money has been earmarked for a specific purpose, and, in the appellants' submission, it is money had and received to the use of the claimants.

That view derives some support from the language of the statute (59 Geo. 3, c. 31), which was passed after the French revolutionary wars. In that case France had agreed to transfer large sums of money to compensate British subjects for losses incurred in those wars, and that Act, which was passed to provide for the liquidation of those claims, spoke of the claimants as "persons legally entitled." That statute recognized that there was a legal right in the subject to be paid out of moneys received under a treaty where compensation was payable. In *Baron de Bode's* case (1), there being a

(1) (1845–1851) 8 Q. B. 208; 13 Q. B. 364; 3 H. L. C. 449.

surplus after all claims under the Act had been dealt with, the claimant claimed by petition of right compensation for losses incurred through the confiscation of his property in the French Revolution, notwithstanding that a claim sent in by him under the Act had been rejected. All the Courts held that he had no remedy apart from the Act, but all the Courts refrained from expressing any opinion on the question whether a petition of right would lie in a case like the present. *Rustomjee's* case (1), on which the Courts below relied, decided only that His Majesty could not be a trustee or an agent for a subject in anything that related to the making or performance of a treaty, and did not decide that His Majesty could not be a trustee or an agent for a subject in respect of moneys when received under the treaty, the distribution of those moneys being no part of the performance of the treaty. If it did so decide, it was, in the appellants' submission, wrong. Moreover, in that case the petition failed to establish any claim on the part of the suppliant for compensation. At the most he was merely entitled to an inquiry. The Victorian idea of the impossibility of maintaining an action against the Crown on the implication of a trust or agency, or for money had and received, has been greatly modified during the present century. The Crown now adopts a very different attitude towards its subjects, and in the appellants' submission it is possible to-day, even in the case of moneys received by the Crown under a treaty, that the Crown should be treated as the agent or trustee of such moneys for the subjects in respect of whose claims the payment was made. [They also referred to *West Rand Central Gold Mining Co.* v. *The King* (2) and *Salaman* v. *Secretary of State for India.* (3)]

Sir William Jowitt A.-G. and *Colin H. Pearson* for the Crown were not called on.

LORD BUCKMASTER. My Lords, during the war there were many subjects of His Majesty who suffered damage to person and to property by attacks from air craft and bombardment from the sea. Claims immediately arose in respect of the injuries that had been so suffered, and were brought at once before the notice of His Majesty's Government. On February 4, 1915, and again on March 31, 1915, the Prime Minister stated that the Government had undertaken to give relief for damage caused by the raids which had then taken place. Again, on February 17, 1915, it was stated by the Chancellor of the Exchequer that payment of relief for damage caused by air craft would be made out of Imperial funds. Following this, on September 7, 1916, a Proclamation was issued calling upon all people who had suffered and who had claims against enemy persons or Governments to make returns of their claims to the proper officers.

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(1) 1 Q. B. D. 487; 2 Q. B. D. 69.
(2) [1905] 2 K. B. 391.
(3) [1906] 1 K. B. 613.

The appellants here represent a number of people who suffered such damage and whose assignees they are, and their case, as formulated in a petition of right which they have presented, is that the Crown has received from Germany moneys in respect of these damages and that it is consequently either an agent or a trustee for them of such moneys, or that the moneys at any rate have been received by the Crown as moneys had and received to their use.

It is plain from what I have stated that up to 1917 nothing had happened to support any such claim at all, for all that had then occurred was that the claimants had been told that they were to file their claims, and statements had been made that the damage suffered would be relieved out of the national funds—indeed, at that moment, whatever might have been hoped, the issue of the war was uncertain, and it was impossible to know what it might be. On July 13, 1917, the Prime Minister, in answer to a memorial asking that full compensation should be made for such losses out of national funds, stated that he accepted in principle the case so made. Up to this time the payment contemplated was out of the funds of this country, but finally, on January 8, 1918, President Wilson made his celebrated speech containing what are called the fourteen points, and when the Armistice was granted it was upon the terms that Germany should make compensation for all damage done to the civilian population of the Allies and their property by land, by sea, and from the air. Following upon that there was a discussion before the Peace Conference as to what these moneys might include, and ultimately the treaty itself was signed, and that contained what are the material provisions for the present purpose. First, in art. 231 there was an affirmation by the Allied and Associated Governments, accepted by Germany, that Germany was responsible for causing all the loss and damage to which the Allied Governments and their nationals had been subjected, and by art. 232 it was provided that compensation should be made in the following words: "The Allied and Associated Governments recognize that the resources of Germany are not adequate after taking into account permanent diminutions of such resources which will result from other provisions of the present treaty to make complete reparation for all such loss and damage. The Allied and Associated Governments however require and Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air and in general all damage as defined in Annex I. hereto." It is known that associated with the specific damage caused on the sea and by air craft and bombardment to our people at home during the war there were included in the claims for damages against Germany large sums representing the damage that was suffered in payment of pensions to soldiers' widows and similar matters, which were in a different category from the damage of the nature I have already mentioned; but the whole was collected into one group claim, and there was no separated and specific claim under one head or another, so that one whole claim was put forward and approved by the Reparations Commission to represent the total claim against Germany under that head. Moneys have undoubtedly been received in respect of that claim, and it is in respect of those moneys that the present proceedings are brought.

In the first place, to establish that any one was a trustee of that fund under the circumstances I have mentioned is, to my mind, to attempt an impossible task. I can see no evidence whatever of an acceptance of trusteeship on the part of the Government, or assertion of trusteeship on the part of the people who suffered damage, nor anything up to the time when the money was received to show that the conception of trusteeship was in the minds of anyone in any form whatever. Indeed, the original statements that were made were made of the readiness to compensate out of the national funds at home, and nobody suggests that the Government were trustees of those funds for this purpose.

Finally, when the moneys were received, it is said that from and after that moment the Crown became a trustee. I have pointed out in the course of the argument, and I repeat, that if that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights must include, among other things, a claim for an account of the moneys that were received, of the expenses incurred, and the way in which the moneys have been distributed. Such a claim presented against the Crown in circumstances such as these would certainly have no precedent, and would, as it appears to me, invade an area which is properly that belonging to the House of Commons.

That the money was received by the Crown as agent seems to me can no more be established than that the money was received by it as trustee. In fact, the trusteeship is the agency stated in other words. If the Crown was not a trustee, neither was it an agent; nor can I see that in any sense the Crown received these moneys as money had and received to the use of the people whose claims were made. The people whose claims were made were not considered by Germany on making the payment at all. The terms of the treaty were that Germany should pay the sum necessary to satisfy the claims of various people who had suffered, and it was left to the Governments themselves, as between them and their nationals, to determine how that money was to be distributed. Therefore, my Lords, on general principle, I should have thought that the petition must fail; but the general principle is immensely strengthened by the case of

H. L. (E.)
1931
Civilian War Claimants Association v. The King.
Lord Buckmaster.

Rustomjee v. *The Queen* (1), for there a case similar in many respects to this, although of course not exactly identical, arose for consideration in the Queen's Bench Division. It was a case of a British subject who had a claim for debt against a group of Chinese merchants, which, owing to Chinese disturbance, had been dissolved and the debts had been lost. When a Treaty was made between Great Britain and China, a sum of money representing 3,000,000 dollars was paid to the British Government on account of the debts that were so due to British subjects from these Chinese merchants, and in that respect the case is closely analogous. There were claims from the British subjects which were gathered together and amounted to a total of 3,000,000 dollars, and those 3,000,000 dollars so constituted were paid over to the British Government, and thereupon one of the alleged creditors issued a petition of right and made precisely the claim that is made here, either that the Crown was an agent or was a trustee, or that the money was money had and received to his use. There can be no doubt that the learned judges expressed themselves upon that claim in extremely emphatic terms. Cockburn C.J. seemed to think that it was strange that any such claim should have been made at all, and Blackburn J. (who subsequently became Lord Blackburn) pointed out that such a claim made a little earlier might have led to very disastrous consequences. Lush J. stated the matter in what I regard as the most simple and the most accurate form of all. He said this (2): "It seems to me that the relation which is pressed upon us here never existed in this case between the Crown and the subject, and is one which cannot exist in any state like ours between the sovereign and the subject." I should like to pause here for a moment to point out that that is a relationship which arises by reason of a treaty having been made in the circumstances there set out, and he adds: "No doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China; but then the

(1) 1 Q. B. D. 487; 2 Q. B. D. 69.

(2) 1 Q. B. D. 497.

distribution when made would be, not the act of an agent accounting to a principal, but the act of the Sovereign in dispensing justice to her subjects. For any omission of that duty the Sovereign cannot be held responsible. The responsibility would rest with the advisers of the Crown, and they are responsible to Parliament, and to Parliament alone." My Lords, that appears to me to be a perfectly exact and accurate way of stating what the true position is, and it completely covers the present case.

Attempts were made to distinguish that authority both on the ground of difference in the circumstances which led to the case coming before the Court, and on the ground, which I found it more difficult to apprehend, that something had happened since the decision of that case that had in some way changed the constitutional relationship of the Sovereign and the subject. I can find nothing to support such a view and I can see no reason why such a change should have taken place. In my opinion the quotation I have made from that judgment is as applicable to this case as it was applicable in the days when that case was decided, and, so regarded, it defeats this claim.

LORD WARRINGTON OF CLYFFE. My Lords, I concur.

LORD ATKIN. My Lords, I concur. It has to be remembered that this House is dealing in this case with a demurrer to a petition of right in which the facts alleged in the petition must be taken to be true for the purposes of the argument. But even making that assumption, it appears to me, for the reasons that have been stated by the noble Lord on the Woolsack, that the petition does not in fact disclose a cause of action, for it discloses the action taken by the Crown in receiving this sum of money in circumstances which make it impossible to impute to the Crown the position either of a trustee or of an agent. In other words, when the Crown is negotiating with another Sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign State, unless indeed the Crown chooses expressly to declare that it is acting as agent. There is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so. In the circumstances of this case there appears to me to be nothing which indicates that the Crown expressly assumed the position of agent or trustee, and I think the circumstances negative the idea that the Crown ever did intend to occupy that position and negative any circumstance from which the law might impose upon it the position either of agent or trustee. It appears to me that the case of *Rustomjee* (1) and the principles laid down therein, limited, as they ought to be, to the circumstances of that case and applied to the circumstances of this case, are perfectly correct.

My Lords, I agree that the appeal should be dismissed.

LORD TOMLIN. My Lords, I concur that this appeal should be dismissed.

LORD MACMILLAN. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 19, 1931.

Solicitors for the appellants: *Russell & Arnholz.*
Solicitor for the Crown: *Treasury Solicitor.*

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(1) 1 Q. B. D. 487; 2 Q. B. D. 69.

[PRIVY COUNCIL.]

J. C.*
1931
Oct. 20.

In re TRANSFER OF NATURAL RESOURCES TO THE PROVINCE OF SASKATCHEWAN. (1)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Vesting and Control of Public Lands—Rupert's Land and North-Western Territory—Order in Council of June 23, 1870*—Alienations by Dominion—Claim by Province of Saskatchewan—Validity of Dominion Legislation—Dominion Lands Act* (35 *Vict. c.* 23, *Dom.*)*—British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 109, 146*—Rupert's Land Act,* 1868 (31 *&* 32 *Vict. c.* 105), *s.* 5.

The effect of the Order in Council of June 23, 1870, whereby Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada, and of s. 5 of the Rupert's Land Act, 1868, was that the lands therein which were then vested in the Crown, and now are within the boundaries of the Province of Saskatchewan, became so vested in the right of the Dominion, and the Dominion was given full control to administer them for the purposes of Canada as a whole, not merely for the inhabitants of the area.

The Dominion Lands Act, 1872, and s. 21 of the Alberta and Saskatchewan Acts, 1905, were therefore validly enacted by the Parliament of Canada.

Judgment of the Supreme Court of Canada [1931] S. C. R. 263 affirmed.

APPEAL (No. 37 of 1931) by special leave from a judgment of the Supreme Court of Canada (February 3, 1931) in answer to questions referred to that Court by the Governor-General in Council under s. 55 of the Supreme Court Act.

The reference was made pursuant to an agreement between the Governments of the Dominion of Canada and the Province of Saskatchewan, dated March 20, 1930. That Province was established by the Saskatchewan Act, 1905, being formed out of a portion of Rupert's Land and the North-Western Territory, which were admitted into and became part of the Dominion by an Order in Council of June 23, 1870. The reference arose out of a claim by the Province in respect of alienations of part of the natural resources of the land within its boundaries between the date of the Order in Council and the establishment of the Province.

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* *Present:* VISCOUNT DUNEDIN, LORD HANWORTH M.R., LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

(1) The parties to appeals from judgments delivered in answer to questions referred by the Governor-General or Lieutenant - Governors being always the Attorneys-General, it is thought that identification of these appeals will be easier if they are entitled in the matter referred.

The questions submitted are set out in the judgment of the Judicial Committee, from which the facts and considerations material to their answer appear.

The answer of the Supreme Court to each of the questions was in favour of the Dominion. Newcombe J. delivered a judgment in which Duff, Rinfret, Lamont, Smith and Cannon JJ. concurred. Anglin C.J. agreed with the reasons of that judgment, but whereas the majority answered question 1 (*d*) " not otherwise than as sharing in any benefit which might accrue to them under the dispositions of Parliament," he was of opinion that it should be answered by a simple negative; with the other answers he concurred. The proceedings are reported at [1931] S. C. R. 263.

The Attorneys-General for Saskatchewan and Alberta appealed.

1931. July 7, 9, 10. *MacPherson K.C.* (Attorney-General for Saskatchewan) and *Bence K.C.* (with them *Barr K.C.* and *Frank Gahan*) for the appellants. At the time of the Order in Council Rupert's Land and the North-Western Territory were recognized as being colonies. It is the established policy of the Empire to appropriate the land revenue of a colony to the benefit of its inhabitants, even if the colony is not self-governing. That principle was applied in 1858 when the colony of British Columbia was founded. As to that part of the area which became the Province of Manitoba, the Manitoba Act, 1868, which was ratified by the British North America Act, 1871, provided expressly that all ungranted lands should be administered by the Dominion for its own purposes, but there was no corresponding enactment as to the remaining parts of the area. By s. 146 of the Act of 1867 the terms upon which the area was transferred were to be "subject to the provisions of this Act." The Act of 1867 draws a marked distinction between legislative powers and proprietary right; the fact that the Dominion acquired legislative power over the area is no indication that it acquired any proprietary right: *Att.-Gen. for Canada* v. *Atts.-Gen. for Provinces.* (1) The intention of the Act, as shown more particularly by s. 109, was that each Province should enjoy the entire beneficial interest of the Crown in all lands within its boundaries, subject only to the specific rights therein given to the Dominion by s. 108 and s. 117: *St. Catherine's Milling and Lumber Co.* v. *The Queen* (2); *Mercer* v. *Att.-Gen. for Ontario.* (3) That principle is not confined to the original Provinces: *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada.* (4) Effect can only be given to the above words in s. 146 by restricting the beneficial interest of the Dominion in the area in question to that which it had under the Act in the case of the public lands of the original Provinces. Even if the area vested in the Dominion for the purpose of administration, s. 5 of the Rupert's Land Act, 1868, shows that it was to be administered for the benefit of "His Majesty's subjects and others therein." In so far as the Dominion Lands Act, 1872, and s. 21 of the Alberta and Saskatchewan Acts, 1905, assumed a greater beneficial interest in the Dominion they were ultra vires. In *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* (5) the Board considered the effect of s. 21 of the Alberta Act, 1905, not its constitutional validity; that was assumed for the purpose of the judgment. The approval of the judgment of Anglin C.J. in *Trusts and Guarantee Co.* v. *The King* (6) was confined to the point that registration of title to land did not affect the nature of its tenure.

Hon. Geoffrey Lawrence K.C. (with him *Milner K.C.* and *Plaxton K.C.*) for the respondent. By the Order in Council of June 23, 1870, read with s. 146 of the British North America Act, s. 5 of the Rupert's Land Act, 1868, and the addresses

(1) [1898] A. C. 700, 709.
(2) (1888) 14 App. Cas. 46.
(3) (1881) 5 Can. S. C. R. 538, 645.
(4) (1888) 14 App. Cas. 295.
(5) [1928] A. C. 475.
(6) (1916) 54 Can. S. C. R. 107.

referred to therein, the area in question was "admitted into and became part of the Dominion," and the Dominion was given full legislative control over it; the legislative authority was reaffirmed by s. 4 of the British North America Act, 1871. Under the above Acts and instruments the Parliament of Canada had the right to dispose of the Crown lands within the area, and to appropriate the revenue so arising to Dominion purposes. By the Manitoba Act, 1868, ratified by the Imperial Parliament in 1871, the Crown lands in that part of the area which was formed into the Province of Manitoba were to be administered for the purposes of the Dominion; it is unlikely that the intention was different as to that part which was not then formed into a Province. The words "subject to the provisions of this Act" in s. 146 of the British North America Act, 1867, meant merely that the agreed terms of transfer were to be consistent with the provisions of the Act. They do not make s. 109 applicable, as that section refers specifically to the original Provinces named in it. There was an express provision in the Order in Council creating the Province of British Columbia, placing it in the same position as to its public lands as the named Provinces: *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada.* (1) By s. 91, head 1, of the Act of 1867, the Parliament of Canada has exclusive legislative authority in respect of "the public debt and property." The appellants' contentions conflict with the validity of the Dominion Lands Act, 1872, the powers under which have been exercised for a very long period, also with s. 21 of the Saskatchewan and Alberta Acts, 1905. The validity of s. 21 of the Alberta Act was recognized by the Board in *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada.* (2) In *Trusts and Guarantee Co.* v. *The King* (3), referred to in the judgment, the Supreme Court considered and rejected a contention that the Crown lands within the boundaries of Alberta never vested in the right of the Dominion. The terms of s. 5 of the Rupert's Land Act, 1868, cannot be construed as giving prospective Provinces to be established

(1) 14 App. Cas. 295, 304.
(2) [1928] A. C. 475.
(3) 54 Can. S. C. R. 107, 121.

J. C.
1931
NATURAL RESOURCES (SASKATCHEWAN), *In re.*

any rights in the land revenue. No trust of that nature can be implied from the circumstances : *In re Southern Rhodesia.* (1) [Reference was made also to *In re s.* 17 *of Alberta Act.* (2)]

MacPherson K.C. replied.

Oct. 22. The judgment of their Lordships was delivered by

LORD ATKIN. This appeal from the Supreme Court of Canada arises upon an order of reference pursuant to s. 55 of the Supreme Court Act, made by the Governor-General in Council, dated May 3, 1930, to determine questions that had arisen between the Dominion and the Province of Saskatchewan. The questions to be answered are to be found in the following formal submission agreed between the Dominion and the Province and annexed to the order of reference :—

" Whereas under an agreement made between the Government of the Dominion of Canada, of the one part, and the Government of the Province of Saskatchewan of the other part, provision is made for the submission to the Supreme Court of Canada, for its consideration, of certain questions agreed upon ; And whereas it is admitted for the purpose of this submission that (*a*) The area now lying within the boundaries of the Province of Saskatchewan formed a part of Rupert's Land and the North-Western Territory, which were admitted into and became a part of the Dominion of Canada under Order in Council of June 23, 1870. (*b*) From the coming into force of the said Order in Council until September 1, 1905, portions of the said area were from time to time alienated by the Dominion of Canada. (*c*) Throughout the following questions the term 'lands' means and includes 'lands, mines, minerals and royalties incident thereto.'

The following questions are submitted for the consideration of the Supreme Court pursuant to s. 55 of the Supreme Court Act :—

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23, 1870, were all

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(1) [1919] A. C. 211, 231, 232.

(2) [1927] S. C. R. 364.

lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown: (*a*) In the right of the Dominion of Canada; or (*b*) in the right of any province or provinces to be established within such area; or (*c*) to be administered for any province or provinces to be established within such area; or (*d*) to be administered for the benefit of the inhabitants from time to time of such area?

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1, 1905?"

The Supreme Court answered all the questions in favour of the Dominion, and the Province of Saskatchewan and the Province of Alberta (which is equally concerned with the decision) appeal.

To appreciate the practical relevance of the questions it is necessary to go back to Canadian constitutional history at the time of the creation of the Dominion. The original provinces federally united by the British North America Act were Canada, Nova Scotia and New Brunswick. Lying to the west and north of the new Dominion were the vast tracts of country known as Rupert's Land and the North-Western Territory. Over this territory the Hudson's Bay Company exercised control more or less defined. Their charter, granted in 22 Charles II., had granted them large powers and a vast extent of land which was not well defined, but which was assumed to cover the whole of what was later known as Rupert's Land. They had extended their jurisdiction into the North-Western Territory, and were in practice the sole authority responsible for the maintenance of law and order in both districts. The existence of a trading company with vast obligations and necessarily limited resources had been recognized before 1867 by Canadian statesmen as an obstacle to the development of Canada, and communications had later taken place between the Government of the then Province of Canada, the British Government and the Company as to the surrender of the Company's charter rights.

By s. 146 of the British North America Act provision was made for power to admit (inter alia) Rupert's Land and the North-Western Territory into the Union. Eventually, on November 19, 1869, in pursuance of an Imperial Act, 31 & 32 Vict. c. 105, the Hudson's Bay Company surrendered to the Crown all their rights granted by charter and all their lands within Rupert's Land. A Dominion Act was passed in the same year providing for the government of the territories after admission to the Union. On June 23, 1870, an Order in Council was made admitting Rupert's Land and the North-Western Territory into the Dominion. In 1870, in anticipation of the Order in Council, the Manitoba Act was passed, creating Manitoba a separate Province, carving its territory out of the new district so to be admitted. Thereafter, under appropriate legislation, Imperial and Dominion, the Dominion of Canada governed the rest of Rupert's Land and the North-Western Territory as part of the Dominion, dealing with the land in pursuance of the Dominion Lands Act of 1872. In 1905 it created out of the district two new Provinces, Saskatchewan and Alberta. Both the Saskatchewan and the Alberta Acts contained provisions by which all Crown lands should continue to be vested in the Crown and administered by the Dominion for the purposes of Canada. In lieu of the land revenue each Province received an annual payment from the Dominion, varying with the population. It would appear that both the new Provinces found these provisions irksome, and objected to being put in a different position from the original Provinces as to land revenue, which under s. 109 of the British North America Act belonged to the Province. Questions were raised as to the validity of the legislation, and eventually in 1930 the Dominion entered into agreements with both Provinces whereby the interest of the Dominion in the public lands in each Province was transferred to the Province. The agreements were made on the express footing that the Provinces should be placed in a position of equality with the other provinces as to their "natural resources" (which would include the land) as from their entry into confederation in 1905.

In this respect the agreement with Saskatchewan appears to put the Saskatchewan claim higher than that of Alberta; but as by the Acts adopting the agreements Alberta is to have no less rights against the Dominion than Saskatchewan, it is unnecessary to go beyond the agreement with the latter. The agreement is made March 20, 1930. The recitals are as follows: "Whereas by s. 22 of the Saskatchewan Act, being chapter 42 of the 4 & 5 Edw. 7, it was provided that 'All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the North-Western Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories': And whereas the Government of Canada desires that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905: And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from July 15, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada: And whereas it has been agreed between Canada and the said Province that the said

J. C.
1931

NATURAL RESOURCES (SASKATCHEWAN), *In re.*

section of the Saskatchewan Act should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Province as herein set out."

After providing for the transfer of the land from the Dominion to the Province and setting out other terms, the agreement contains two clauses which give rise to this reference —namely :—

"23. Provision will be made pursuant to s. 55 of the Supreme Court Act, being chapter 35 of the Revised Statutes of Canada, 1927, to submit for the consideration of the Supreme Court of Canada questions agreed upon between the parties hereto as being appropriate to obtain the judgment of the said Court, subject to appeal to His Majesty in Council in accordance with the usual practice, as to the rights of Canada and the Province respectively, before September 1, 1905, in or to the lands, mines or minerals (precious or base), now lying within the boundaries of the Province, and as to any alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto.

24. As soon as the final answers to the questions submitted under the last preceding paragraph have been given, the Government of Canada will appoint three persons to be agreed upon to be Commissioners under Part I. of the Inquiries Act, to inquire and report whether any and, if any, what consideration, in addition to the sums provided in paragraph 21 hereof, shall be paid to the Province in order that the Province may be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources either as from September 1, 1905, or as from such earlier date, if any, as may appear to be proper, having regard to the answers to the questions submitted as aforesaid ; such commissioners to be empowered to decide what financial or other considerations are relevant to the inquiry and the report to be submitted to the Parliament of Canada and to the Legislature of Saskatchewan ; if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments

of Canada and of the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such agreement."

It will be seen that it is only in order that Saskatchewan may support a claim under clause 24 of the agreement to be placed in a position of equality with other provinces with respect to the administration of its natural resources as from an earlier date than September, 1905 (the date of its creation as a province), that the questions arise at all. The position after 1905 is admittedly to be adjusted. Their Lordships feel bound to remark that it is difficult to see how Saskatchewan passes over the threshold of this claim. It had no separate existence at all before 1905, except as part of the North-Western Territories. Its predecessor, if a unit newly created and defined can have a predecessor, was the Dominion or, on the extreme view, the North-Western Territories, which also included the present Province of Alberta and other territory as well. It would appear to be difficult to correlate such a position to that of the other provinces of the Union, or to speak of "its" natural resources before it took any shape. However, the questions have been formulated and should be answered.

The argument of the Attorney-General for the Province may be summarized as follows. There was a well-established Imperial policy as to colonies that they should enjoy, for the benefit of the inhabitants, the revenues of lands in the colony vested in the Crown. This did not depend upon the colony being self-governing. This area was a colony before 1867, and though as to a large part of it the land was vested in the Hudson's Bay Company, yet on the surrender by that Company of its charter the colony was restored to its appropriate position of enjoying proprietary rights in the land. It therefore was in the same position as the original colonies, whose rights to the land were maintained as a fundamental principle of the British North America Act. On the true construction of the Order in Council and the legislation giving effect to the admission of the area into the

J. C.
1931
NATURAL RESOURCES (SASKATCHEWAN), *In re.*

Confederacy, the Dominion Government and Dominion Legislature were intended to administer the land revenues for the beneficial use of the inhabitants only of the area in question. Upon the establishment of the Province it must be taken to have attained its majority, and was entitled to go back to 1870 and have an account of the use of its resources during that time.

For the purposes of this case it is not necessary to discuss the accuracy of the earlier propositions in this argument. It may well be doubted whether there has ever been an invariable rule that a colony enjoyed its own land revenue. It would appear to be a question of fact in each case whether the Crown had placed its beneficial interest in land at the disposal of the particular colony. In the present case it is known that the Crown had parted with all its interest in the land to the Hudson's Bay Company so far as Rupert's Land is concerned. As to the North-Western Territory, it is at least doubtful whether before 1867 the beneficial interest in the land had been entrusted by the Crown to any authority, or whether there was in respect of that part of the area any colony at all within the meaning of the Attorney-General's argument. But, even assuming that the propositions in question were established, their Lordships have no doubt whatever that the effect of the surrender of the charter rights and the relevant legislation was on the admission of the area in question into the Dominion to give the Dominion full control of the land to be administered for the purposes of the Dominion as a whole, and not merely for the inhabitants of the area.

It is only necessary to read the addresses of the Dominion Parliament dealing with the admission of the new areas to be satisfied that the control of the whole area by the Dominion was treated as an important factor in Canadian policy, and was advocated in the words of the first address "to promote the prosperity of the Canadian people and conduce to the advantage of the whole Empire." It is not merely improbable, but it is incredible, that at that stage of the development of Canada the resources of the immense area added to the

Dominion were to be administered solely for the advantage of the sparse population scattered over its thousands of square miles. Even contemporaneously, when Manitoba was created a Province it was not given control of its lands: and it would certainly be remarkable if after 1870 the Dominion administered Manitoba's land for the purposes of the Dominion, but administered the larger areas of Rupert's Land and North-Western Territory for the purposes only of their few inhabitants. The provisions of the Order in Council and of s. 5 of the Imperial Act of 1868, Rupert's Land Act, make it clear that the Dominion was to govern the new area when admitted as part of the Dominion for the purposes of the Dominion.

An argument was based on the terms of s. 146 of the British North America Act, which provides the power to admit Rupert's Land, etc., into the Union "on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provision of this Act." It was said that the reference to the provisions of this Act incorporated the proviso made in s. 109 that all the lands belonging to the several provinces of Canada, Nova Scotia and New Brunswick should continue to belong to the provinces, and that no powers could be given to the Dominion inconsistent with this. The answer is that s. 109 dealt only with the provinces thus admitted, and the provisions of the Act referred to in s. 146 are plainly the general provisions covering the structure of the Union into which new provinces were to be admitted, as, for instance, the section distributing legislative and other functions between the Dominions and the constituent provinces.

It is to be noted that the argument for the Province necessarily disputed the validity not only of s. 21 of the Alberta and Saskatchewan Acts of 1905, but also of the Dominion Lands Act of 1872. As to the Act of 1905, the validity of s. 21 appears to their Lordships to have been specifically upheld in the judgment of this Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), where it was

(1) [1928] A. C. 475.

decided that lands in Alberta granted by the Crown before or after September, 1905, in the absence of heirs, escheat to the Crown in right of the Dominion. There was adduced before their Lordships no ground for attacking the Dominion Lands Act of 1872 other than the general considerations mentioned above, which, as stated, have not the effect claimed. It follows that the answers to the respective subheads of question 1 must be in favour of the Dominion.

Their Lordships entirely agree with the reasoning of the judgment of Newcombe J. in the Supreme Court. It does not seem necessary to determine the slight difference of opinion between the Chief Justice and the other members of the Court as to the exact answer to question 1 (*d*). Treating the question, as the Chief Justice seems to have done, as meaning "to be administered exclusively for the benefit of the inhabitants from time to time of the area," the answer admits of a simple negative; but the qualified answer given by the majority of the Court cannot in any way be said to be wrong. The second question seems to be intended to ask as to the existence of a legal obligation to account to the Province of Saskatchewan for something done before the Province came into existence, without any statutory provision for the Province inheriting, or in some way having transferred to it, the rights, whatever they were, which before 1905 were invaded. As no rights were invaded, it is obvious that the question is correctly answered, No; and it becomes unnecessary to consider how, on a different hypothesis, an obligation to account could have been enforced by the Province.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and in accordance with the usual practice in such cases without costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

In re THE INSURANCE ACT OF CANADA.

J. C.*

1931

Oct. 22.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada—Legislative Power—Insurance Business in Province—Aliens—Immigration—Taxation—Provincial matter disguised as Dominion matter—Insurance Act (*R. S. Can.*, 1927, *c.* 101), *ss.* 11, 12—*Special War Revenue Act* (*R. S. Can.*, 1927, *c.* 179), *s.* 16—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92, 95.

A foreign or British insurer licensed under the Quebec Insurance Act to carry on business within the Province can do so without being also licensed under the Insurance Act of Canada. Sects. 11 and 12 of that Act requiring them to be licensed thereunder are ultra vires under the British North America Act, 1867, since, in the guise of legislation as to aliens and immigration, matters within the Dominion authority, they seek to intermeddle with the conduct of insurance business, which was declared in *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* [1916] 1 A. C. 588 to be a subject exclusively within Provincial authority.

Sect. 16 of the Special War Revenue Act of Canada is also ultra vires. In the guise of legislation imposing Dominion taxation, it in reality deals with the Provincial subject above mentioned.

Att.-Gen. for Ontario v. *Reciprocal Insurers* [1924] A. C. 328 followed.

Judgment of the Court of King's Bench for Quebec varied.

APPEAL and CROSS-APPEAL (No. 36 of 1931) from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, delivered on June 28, 1930, in answer to questions referred to that Court by the Lieutenant-Governor in Council under R. S. Queb., 1925, c. 7.

The questions referred were :—

1. Is a foreign or British insurer who holds a license under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer ?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Canada? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a license to carry on business in the Province and any other case?

The terms of ss. 11 and 12 of the Insurance Act of Canada (R. S. Can., 1927, c. 101) and of s. 16 of the Special War Revenue Act (R. S. Can., 1927, c. 179) appear from the judgment here reported. Sects. 65 and 66 of the former Act imposed penalties for contraventions of ss. 11 and 12; s. 20 of the latter Act requires every person to whom s. 16 applies to make an annual return of the names of the companies, etc., with which he has effected insurances, and s. 21 imposes penalties for contraventions of s. 20.

The answers made by the Court of King's Bench were as follows: To question 1 (by a majority)—in the case of a foreign insurer, " yes " to the first part, " no " to the second part; in the case of a British insurer, " no " to the first part and " yes " to the second part. To question 2 (unanimously)—" yes " to the first part, and " no " to the second part. The proceedings are reported at Q. R. 49 K. B. 236.

1931. July 20, 21. *Lanctot K.C.*, *Geoffrion K.C.* and *Maurice Alexander* for the Attorney-General for Quebec, appellant in the first appeal.

St. Laurent K.C. and *Plaxton K.C.* for the Attorney-General for Canada, respondent in the first appeal.

Tilley K.C., *E. Bayly K.C.* and *Leighton Foster* for the Attorney-General for Ontario, intervener.

Lanctot K.C. and *Maurice Alexander* for the Attorney-General for British Columbia, intervener.

V. Evan Gray for intervening companies.

In addition to cases referred to in the judgment of their Lordships, reference was made to *Cunningham* v. *Tomey Homma* (1); *Brooks-Bidlake and Whittall, Ld.* v. *Att.-Gen. for British Columbia* (2); and *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (3)

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(1) [1903] A. C. 151.
(2) [1923] A. C. 450.
(3) [1929] A. C. 260.

J. C.
1931
INSURANCE ACT OF CANADA, *In re.*

Oct. 22. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. Under one of the provisions of the statutes of Quebec the Lieutenant-Governor in Council may refer to the Court of the King's Bench for hearing and consideration any question he deems expedient. Acting under that provision and upon the narrative that several foreign or British insurers had obtained licenses under the Quebec Insurance Act and that the Department of Insurance of the Dominion was endeavouring to force these companies to obtain a license under ss. 11 and 12 of the Insurance Act of Canada, R. S. Can., 1927, c. 101, and to recover from persons who insure with these insurers the tax imposed by ss. 16, 20 and 21 of the Special War Revenue Act, R. S. Can., 1927, c. 179, the Lieutenant-Governor in Council referred to the Court of King's Bench the following questions :—

1. Is a foreign or British insurer who holds a license under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer ?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada ? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a license to carry on business in the Province and any other case ?

Sects. 11 and 12 of the Insurance Act of Canada are as follows :—

" 11. It shall not be lawful for (*a*) any Canadian company ; or (*b*) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

" 12. It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding or filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act."

Sects. 65 and 66 need not be quoted as they only prescribe penalties for contravention.

The case was heard before five judges. There was some difference of opinion between them as to the answer to the first question, but the judgment of the majority gave answer as follows: In the case of a foreign insurer, " yes " to the first part, " no " to the second. In the case of a British insurer, " no " to the first part and " yes " to the second. As to the second question they were unanimous, and the answer was " yes " to the first part and " no " to the second.

In the presentation of the case appearance has been entered by the Attorneys-General for Quebec, Ontario and British Columbia, also by certain companies which insured their property against fire and other risks with various insurance companies and underwriters of Canadian, British and foreign origin carrying on insurance business in Canada. These parties all contended that the sections cited were unconstitutional and ultra vires. The Attorney-General for Canada, who also appeared, contended that they were constitutional and intra vires. Success being divided the Attorney-General for Quebec appealed and the Attorney-General for Canada cross-appealed to His Majesty in Council. This case is, it may be hoped, the last of the series of litigations between the Dominion and the Provinces with regard to insurance.

It is not in their Lordships' opinion necessary for them, as it was for the judges in the Courts below, to examine in detail the various cases that have arisen in the Canadian Courts. They think that the questions raised can be conclusively dealt with in the light of four cases which have reached this Board. These are in chronological order: *Citizens Insurance Co.* v. *Parsons* (1); *John Deere Plow Co.* v. *Wharton* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (3); and *Attorney-General for Ontario* v. *Reciprocal Insurers.* (4)

The case of the *Citizens Insurance Co.* v. *Parsons* (1) was not fought directly between the Dominion and the Provinces, either as parties or interveners. It was an action by a private individual to recover money under an insurance contract for a loss by fire. The defence was non-compliance on the part of the insured with certain statutory conditions imposed by a Provincial Ontario Act and applicable to insurers, to which the answer was made that the provisions were ultra vires as trespassing on the province of Dominion legislation. It was held that the conditions were not ultra vires, and the defence was good. The arguments turned on what may be called the competing claims of ss. 91 and 92 of the British North America Act. The principle laid down was clear. It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business, to wit, insurance; and nothing that the Provinces can do by legislation can interfere with the status so created; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.

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(1) (1881) 7 App. Cas. 96.
(2) [1915] A. C. 330.
(3) [1916] 1 A. C. 588.
(4) [1924] A. C. 328.

John Deere Plow Co.'s case (1) related to a company incorporated under Dominion legislation to carry on the business of trading in agricultural implements throughout Canada. The Parliament of British Columbia sought means to restrain any such trade by enacting that the trader should have no power to sue unless he had obtained a license to trade from the Provincial authorities. It was held that this was ultra vires of the Province, as being an attempt to interfere with the status of the company.

Then came the case of *Attorney-General for Canada* v. *Attorney-General for Alberta.* (2) This was the first direct trial of strength between a Province and the Dominion. By s. 4 of the Dominion Insurance Act of 1910 it was provided that no company or person should do insurance business unless they had received a Dominion license so to act. This provision was fortified by a penalty for contravention under s. 70. Two questions were put to the Court: (1.) Are ss. 4 and 70 of the Act or any part thereof ultra vires of the Parliament of Canada ? (2.) Does s. 4 operate to prohibit a foreign company carrying on business without a license even though its business is confined to one Province ?

The Board answered the first question in the affirmative. Here again the arguments turned on the competing claims of ss. 91 and 92, and the decision on this question conclusively and finally settled that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter. It really only carried to their logical conclusion the two cases already cited.

As to the second question, Lord Haldane said (3): "The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question

(1) [1915] A. C. 330.
(2) [1916] 1 A. C. 588.
(3) [1916] 1 A. C. 588, 597.

their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

The first question in the present appeal really turns upon whether the sections impugned fall within the sentence of the Board just quoted.

But before discussing this it will be well to examine the remaining case mentioned—namely, the *Reciprocal Insurers'* case. (1) After the decision against them on the first question in the last case in 1916, the Dominion legislation on this subject was altered. A new Act was passed in 1917. In place of the old s. 4, which had been declared ultra vires by the decision, there were now enacted ss. 11 and 12 in these terms :—

"It shall not be lawful for (*a*) any Canadian company; or (*b*) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act." 1917, c. 29, s. 11.

"12.—(1.) It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt, or any policy of insurance, or granting, in consideration of any premium

(1) [1924] A. C. 328.

J. C.
1931
INSURANCE ACT OF CANADA, *In re.*

or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding, or of filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

"(2.) A company shall be deemed to immigrate into Canada within the meaning of this section if it sends into Canada any document appointing or otherwise appoints any person in Canada its agent for any of the purposes mentioned in subsection one of this section."

Contravention of these provisions was dealt with by sections imposing penalties. But besides that, there had been inserted in the Criminal Code two new sections, 508c and 508d, which constituted as a criminal offence the doing of insurance business without a Dominion license. Meantime Ontario had passed an Act dealing with mutual insurance. This led to the case in which the questions proposed were as follows: (1.) Is it within the legislative competence of the legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922? (2.) Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508c and 508d of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 and 8 Geo. 5 in the absence of a license from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada, 7 & 8 Geo. 5, c. 29? (3.) Would the answers to questions 1 or 2 be affected, and if so, how, if one or more of the persons subscribing to such Reciprocal Insurance contracts is: (*a*) a British subject not resident in Canada immigrating into Canada? (*b*) an alien?

Mr. Justice Duff, who delivered the judgment of the Board, expressed himself thus (1): "The provisions relating

(1) [1924] A. C. 336.

J. C.
1931

INSURANCE ACT OF CANADA, *In re.*

to licenses in the Insurance Act of 1910, which" [by the judgment of 1916] "was declared to be ultra vires, and the regulations governing licenses under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself. The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508C is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain 'the true nature and character' of the enactment: *Citizens Insurance Co.* v. *Parsons* (1); its 'pith and substance': *Union Colliery Co.* v. *Bryden.* (2) . . . ."

The Board proceeded to decide that the amendment of the criminal law by s. 508C was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion, that which had exactly been determined to be ultra vires by the judgment of 1916. This decided the main question.

As regards question 3, it was answered in the negative, but there was added the following addendum: "Their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, considered it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board, in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament."

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(1) 7 App. Cas. 96.

(2) [1899] A. C. 580.

Following on this judgment, the Dominion Parliament, by an amending statute in 1924, repealed sub-s. 2 of s. 12 of the Act of 1917. The Act of 1927, which is the Act with which the present case has to do, reproduces, as has been seen, ss. 11 and 12 and the corresponding penal sections renumbered as 66 and 67, and in the Criminal Code of 1927 the old 508C reappears as 507, but with an exception as to reciprocal insurance companies so as to avoid the direct result of the judgment of 1924.

Their Lordships are now in a position to address themselves directly to the first question in this case. It is clear from the quotations from the *Reciprocal Insurers'* case (2) that the question is technically still open, and it is clear from the judgment in the 1916 case that the sections in question can only be justified if to them can be applied what was there said by Lord Haldane in his answer to query 2. Their Lordships will repeat it: "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens."

The state of opinion in the Court below was as follows: Two learned judges thought that the sections were ultra vires, whether applied to British or to foreign insurers; but three

(1) [1916] 1 A. C. 588.

(2) [1924] A. C. 328.

judges, while holding the sections ultra vires as to British subjects, held that they were intra vires as to aliens. Now so far as British subjects were concerned the view was that Lord Haldane's dictum showed clearly that the only power of restriction given rested upon its being possible to connect it with alien legislation, and that therefore it was impossible to bring British subjects within the scope of the dictum. So far as this argument goes, their Lordships think it is sound, but at the same time they think it unnecessary, because they think it is swallowed up in the wider consideration which makes the sections bad as regards both aliens and British subjects. Their Lordships consider that although the question was studiously kept open in the *Reciprocal Insurers'* case (1), it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid s. 95 of the British North America Act, 1867, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

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(1) [1924] A. C. 328.

J. C.
1931
INSURANCE ACT OF CANADA, *In re.*

As regards British subjects, who cannot be styled aliens, once the false definition is gone, the same remark applies as to alien immigrants. This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, i.e., the Provincial Code.

Passing now to the second question, it seems to their Lordships that precisely the same line of reasoning applies. The only section that need be quoted is s. 16, the other sections being only concomitants thereto; that section is as follows: "(16.) Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (*a*) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (*b*) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year."

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Sect. 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so; that a Dominion license so far as authorizing transactions of insurance business in a Province is concerned,

J. C.
1931

INSURANCE ACT OF CANADA, *In re.*

is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.

Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the *Reciprocal Insurers'* case. (1) He says: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "criminal" substitute "taxing," the sentence expresses precisely their Lordships' views.

Their Lordships will, therefore, humbly advise His Majesty to declare that the proper answers to the questions put are: to the first part of question 1, "No"; and to the second part, "Yes"; to the second question in both branches, "No"—and that the appeal and cross-appeal should be dealt with in accordance with the said declaration.

Solicitors for Attorneys-General for Provinces: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for intervening companies: *Lawrence Jones & Co.*

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(1) [1924] A. C. 328, 342.

[PRIVY COUNCIL.]

J. C.*
1931
Oct. 22.

In re THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Aerial Navigation—International Convention—Dominion Power as to Treaty Obligations—Residual Legislative Power—Matter of National Interest and Importance—Reference of abstract Questions—Aeronautics Act (R. S. Can., 1927, *c.* 3), *s.* 4*—Air Regulations,* 1920*—British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92, 132.

The whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion.

Having regard to (*a*) s. 132 of the British North America Act, 1867, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, under treaties between the British Empire and foreign countries, (*b*) the fact that an international Convention of 1919, a treaty under s. 132, covered almost every conceivable matter relating to aerial navigation, and (*c*) the further powers of the Parliament of Canada under s. 91, heads 2 (trade and commerce), 5 (postal services) and 7 (military and naval services), substantially the whole field of legislation in regard to the subject belongs to the Dominion. Any small portion not vested in the Dominion by specific words in the Act of 1867 is not so vested in the Provinces, and necessarily belongs to the Parliament of Canada under its authority to make laws for the peace, order and good government of Canada. Further, the subject of aerial navigation, and the fulfilment of Canadian obligations under s. 132, are matters of national interest and importance; aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

Consequently, the Dominion powers under s. 132 in relation to the obligations under the Convention were exclusive powers, and the Parliament of Canada had authority to enact the Aeronautics Act (R. S. Can., 1927, c. 3), s. 4, and the Air Regulations, 1920, respecting the licensing of pilots, navigators, etc., and the regulation and licensing of all aircraft, aerodromes and air stations.

Observations as to the difficulties which may arise from the reference to the Supreme Court of abstract questions, and the duty of the Judicial Committee in the matter: *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* [1914] A. C. 153, 162 referred to thereon.

Judgment of the Supreme Court of Canada [1930] S. C. R. 663 reversed.

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* *Present:* Lord Sankey L.C., Viscount Dunedin, Lord Atkin, Lord Russell of Killowen, and Lord Macmillan.

APPEAL (No. 38 of 1931) by special leave from a judgment of the Supreme Court of Canada, dated October 7, 1930, in answer to questions referred to that Court by the Governor General in Council under s. 55 of the Supreme Court Act.

The questions referred, and the answers returned by the Supreme Court, were as follows :—

(1.) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled " Convention relating to the Regulation of Aerial Navigation ? "

Answer : To question 1 as framed, the Court unanimously answers " No."

(2.) Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province, necessary or proper for performing the obligations of Canada, or of any Province thereof, under the Convention aforementioned, within the meaning of s. 132 of the British North America Act, 1867 ?

Answer : The answer of the majority of the Court (Anglin C.J., Duff, Rinfret, Lamont, Smith and Cannon JJ.) is : " Construing the word ' generally ' in the question as equivalent to ' in every respect ' the answer is ' No.' "

(3.) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, c. 3, R. S. Can., 1927 ?

Answer : The answer of the majority of the Court (Anglin C.J., Duff, Newcombe, Rinfret, Lamont and Cannon JJ.) is : " Construing the question as meaning, ' Is the section mentioned, as it stands, validly enacted ? ' the answer is ' No.' " But, if the question requires the Court to consider the matters in the enumerated sub-heads of s. 4 of the statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the judges.

(4.) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of

J. C.
1931
THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

the regulations contained in the Air Regulations, 1920, respecting: (*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences; (*b*) The regulation, identification, inspection, certification and licensing of all aircraft; and (*c*) The licensing, inspection and regulation of all aerodromes and air stations?

Answer: The answers are to be ascertained from the individual opinions or reasons certified by the judges.

The reasons of the learned judges appear from a report at [1930] S. C. R. 663.

The Convention referred to in question 1 was drawn up in Paris at the Peace Conference, and dated October 13, 1919; it was subsequently signed by representatives of the Allied and Associated Powers, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922. It consisted of forty-three articles and sixteen annexes of an elaborate character.

The nature of the matters dealt with in the Convention, also the provisions of the Dominion legislation and of the Regulations made thereunder, now represented by s. 4 of the Aeronautics Act (R. S. Can., 1927, c. 3) and the Air Regulations, 1920, appear from the present judgment.

By the British North America Act, 1867, s. 132: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries." The material provisions of ss. 91 and 92, which contain a distribution of legislative powers between the Dominion and the Provinces, appear from the judgment.

The present appeal by the Attorney-General for Canada was confined to answers 1, 3 and 4; the reasons for not desiring to review answer 2 are stated in the judgment.

1931. July 10, 14, 16, 17, 20. *Tilley K.C.* and *Plaxton K.C.* (with them *A. T. Denning*) for the appellant, the Attorney-

General for Canada. Aerial navigation in Canada is a subject entirely within the authority of the Parliament of Canada under the British North America Act, 1867, independently of s. 132 of that Act. It is not within any of the heads of s. 92, as they are confined to matters which are Provincial and local. That appears from their terms; moreover it has been held that the words "matters of a local and private nature" at the end of s. 91 are descriptive of all the heads of s. 91: *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada.* (1) The subject is not of merely local and Provincial concern, but is, in the words of the judgment in that appeal, "of unquestionable Canadian interest and importance." It is a matter which could only be dealt with effectively as a single subject of legislation. The Convention shows that it affects the whole body politic of Canada. The whole subject therefore falls within the powers of the Parliament of Canada, under the initial words of s. 91, to make laws for the peace, order and good government of Canada in matters not assigned to the Provincial legislatures. Aerial navigation is a right of the public generally, not special to any Province, consequently its regulation and control, like that of the public right of fishing in tidal waters, is outside the authority of the Provincial legislatures and within that of the Dominion: *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* (2); *Att.-Gen. for Canada* v. *Att.-Gen. for Quebec.* (3) The maxim "cujus est solum ejus est usque ad coelum" does not apply so as to prevent aerial navigation from being a public right; flying over land is not a trespass to any proprietary right: *Pickering* v. *Rudd* (4); *Clifton* v. *Bury* (5); *Foy* v. *Prentice.* (6) If it is necessary to refer the Dominion power to a specific head of s. 91, the subject as a whole was within head 2 (the regulation of trade and commerce), and head 10 (navigation and shipping). The words in which the enumerated powers are expressed

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(1) [1896] A. C. 348, 359, 360.
(2) [1914] A. C. 153.
(3) [1921] 1 A. C. 413.
(4) (1815) 4 Camp. 219.
(5) (1887) 4 Times L. R. 8.
(6) (1845) 1 C. B. 828.

J. C.
1931
THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

should be construed so as to give effect to the scheme of the Act as a whole : *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* (1) ; Story's American Constitution, 4th ed., p. 310. The word "navigation" in head 10 should therefore not be restricted to navigation as understood in 1867. Although the application of s. 91, head 2, has been restricted by decisions, it has been recognized as authorizing legislation affecting Canada as a whole. For instance, as enabling the incorporation of companies with Dominion status and powers with which the Provincial legislatures cannot interfere : *John Deere Plow Co.* v. *Wharton.* (2) The power under s. 91, head 2, has recently been considered in the light of decisions of the Board by Duff J. in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction* (3), a distinction being drawn between that which is national in its scope, as this matter is, and that which is of Provincial interest. The exercise of the power under s. 91, head 2, is not confined to matters as to which the Dominion has legislative powers otherwise : *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada* (4) ; there are earlier dicta which appeared to state the contrary. As to particular regulations the appellant relies also upon s. 91, heads 5 (postal services), 7 (military and naval services), 9 (beacons), 27 (aliens). So far as any regulation was not directly within any specified head of s. 91, it was necessary to make regulations within those heads effective. If aerial navigation is to be regarded as a subject wholly outside the enumerated heads of both ss. 91 and 92, it is clearly within the power to make laws for the peace, order and good government of Canada ; s. 91 declares that the generality of that power is not to be affected by the enumerations which follow.

Apart, however, from ss. 91 and 92, the Parliament of Canada under s. 132 is the only legislature authorized to perform treaty obligations, whether of Canada or of the Provinces. The Convention deals with so many topics that

(1) [1912] A. C. 571, 581.
(2) [1915] A. C. 330.
(3) [1931] S. C. R. 357, 364.
(4) [1931] A. C. 310, 326.

J. C.
1931

THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

those obligations cannot be performed effectively without some regulations not directly within its terms.

Sir John Simon K.C. (with him *Lanctot K.C.*, *Geoffrion K.C.*, *Frank Gahan* and *Maurice Alexander*), for the respondent, the Attorney-General for Quebec. The legislative powers may first be considered apart from the Convention. The distribution in ss. 91 and 92 is intended to be complete though the heads may overlap. An important function of a legislature is to make laws as to transport, which subject includes aerial navigation, but transport is not dealt with save so far as "navigation and shipping" is assigned to the Dominion, and by s. 92, head 10, the subject, to a limited extent, is taken out of the Provincial power. The reason is that transport (including aerial navigation), in all its material incidents, is a matter within the exclusive powers of the Provinces under s. 92, head 13 (property and civil rights). Aeroplanes and aerodromes are property as certainly as motor cars and garages, and their use is a civil right in the Province where they may be. Aeroplanes may be, and are, used by Provincial authorities for such purely Provincial objects as the detection of forest fires, survey and police purposes. These are matters of a local nature within s. 92, head 16. The regulations themselves show the great extent to which the subject is within the exclusive powers of the Provinces. The matter is not within s. 91, head 10. The considerations as to flying over land differ materially from those as to the navigation of the sea and tidal waters by ships; the use of the words "navigation" and "ship" in connection with flying are merely metaphorical. Nor can the legislation be justified under s. 91, head 2, having regard to the extensive interference with matters within the exclusive powers of the Provinces under s. 92, heads 13 and 16: *In re Board of Commerce Act*, 1919. (1) The general power of the Parliament of Canada to make laws for the peace, order and good government of Canada is limited by s. 91 to matters not exclusively assigned to the Provinces. If the subject-matter is within a head of s. 92, legislation thereon is

(1) [1922] 1 A. C. 191.

J. C.
1931

THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

valid under the general power only if it can be brought within the specific heads under s. 91: *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* (1); *Att.-Gen. of Manitoba* v. *Manitoba Licence Holders' Association* (2); *John Deere Plow Co.* v. *Wharton.* (3) The matter does not fall within the limited principle upon which in *Russell* v. *The Queen* (4) (as explained in *Toronto Electric Commissioners* v. *Snider* (5) and *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (6)) Dominion legislation was held to be valid under the general power. Those judgments show that cases to which that principle applies are highly exceptional and arise only in the event of an emergency such as war; that view was stated also in *In re Board of Commerce Act,* 1919. (7) Legislation is not competent under the general power merely because it is for the general advantage of Canada or meets a want felt throughout the Dominion: *Snider* case. (5) Inconvenience, owing to the absence of legislation, can be met by legislative co-operation between the Provinces: *City of Montreal* v. *Montreal Street Ry.* (8)

The view in the Supreme Court as to question 1 was right. The word "exclusively" is not in s. 132, though it is in ss. 91, 92 and 93. Sect. 132 gives only such power as is necessary or proper for fulfilling the obligations referred to. If Provincial legislation adequately covers the matter there is nothing for the Dominion to do under s. 132; the section does not prevent the Provinces from legislating as to a Provincial matter, though it is a matter concerned with aerial navigation. The answer to question 3 is that s. 4 of the Aeronautics Act is wholly invalid. Having regard to the opening words, which purport to authorize the Minister to regulate and control aerial navigation over Canada as a whole, the provisions are not severable so as to make it possible to hold them valid in part and invalid in part: *Rex* v. *Faversham Fishermen's Company* (9); *Attwood* v. *Lamont* (10);

(1) [1896] A. C. 348, 360.
(2) [1902] A. C. 73, 79.
(3) [1915] A. C. 330, 337.
(4) (1882) 7 App. Cas. 829.
(5) [1925] A. C. 396, 412.
(6) [1923] A. C. 695.
(7) [1922] 1 A. C. 191, 197.
(8) [1912] A. C. 333.
(9) (1799) 8 T. R. 352.
(10) [1920] 3 K. B. 571.

J. C.
1931

THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

Att.-Gen. for Manitoba v. *Att.-Gen. for Canada.* (1) With regard to question 4, each regulation should be considered as though it were a section in a Dominion statute. The regulations cannot be justified by the Convention as, subject to some amendments, they were enacted before the Convention was signed. In any case the obligations to be performed under s. 132 were only those relating to international flying. The section did not justify a vast body of regulations dealing with the whole subject. The power was not so exercised in relation to the Japanese treaty (3 & 4 Geo. 5, c. 27, Can.) referred to in *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (2); nor by 11 & 12 Geo. 5, c. 8 (Can.), in relation to the French trade agreement. The judgment of Duff J., concurred in by Rinfret and Lamont JJ., which dealt with the regulations in detail, is adopted.

E. Bayly K.C. and *J. T. White K.C.* for the respondent the Attorney-General for Ontario, adopted the argument on behalf of the Attorney-General for Quebec.

Tilley K.C. in reply. The fact that the Aeronautics Act and the Air Regulations originated before the Convention was signed is not material having regard to the terms and purpose of the questions. Transport is an essential part of "trade and commerce." Sect. 92, head 13, applies only to that part of the subject which is local in a Province, as is shown by head 10; by head 10 (*a*) the Dominion is made the sole judge whether a work wholly within a Province is to be under the control of the Dominion as of general advantage. The Provincial power does not apply where inter-Provincial matters are involved: *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada.* (3) Sect. 92, head 13, must be read in conjunction with the other heads; unless its effect is limited the Parliament of Canada could make few or no laws under its general power: *Russell* v. *The Queen.* (4) The subject of aerial navigation is of an order which passes beyond the heads of s. 92, and in relation to it the heads of s. 92 are to

(1) [1925] A. C. 561.
(2) [1924] A. C. 203.
(3) [1896] A. C. 348, 364.
(4) 7 App. Cas. 829, 839.

J. C.
1931
THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

be regarded in a new and special aspect : *Toronto Electric Commissioners* v. *Snider* (1) ; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (2) The rule to be applied is that laid down by the Board in relation to the public right of fishing : *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada.* (3) There is no proprietary interest in the air over a Province : Oppenheim's International Law, vol. 1, p. 498. It is not contended that a Province may not have a Provincial air service subject to the observance of the Dominion regulations.

Oct. 22. The judgment of their Lordships was delivered by

LORD SANKEY L.C. This appeal raises an important question as between the Dominion and the Provinces of Canada regarding the right to control and regulate aeronautics, including the granting of certificates to persons to act as pilots, the inspection and licensing of aircraft, and the inspection and licensing of aerodromes and air-stations. The question is whether the subject is one on which the Dominion Parliament is alone competent to legislate, or whether it is in each Province so related to Provincial property and civil rights and local matters as to exclude the Dominion from any (or from more than a very limited) jurisdiction in respect of it.

The Supreme Court of Canada has decided the question in its several branches adversely to the claims of the Dominion, and has held in effect that while the Dominion has a considerable field of jurisdiction in the matter under various heads of s. 91 of the British North America Act, 1867, there is also a local field of jurisdiction for the Provinces, and that the Dominion jurisdiction does not extend so far as to permit it to deal with the subject in the broad way in which it has attempted to deal with it in the legislation under consideration.

During the sittings of the peace conference in Paris at the close of the European war, a convention relating to the regulation of aerial navigation, dated October 13, 1919, was drawn up by a Commission constituted by the Supreme Council of the peace conference. That convention was signed by the representatives of the allied and associated powers, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922. It is now in force between the British Empire and seventeen other States.

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(1) [1925] A. C. 396, 412.

(2) [1923] A. C. 695, 704.

(3) [1914] A. C. 153, 172–174.

With a view to performing her obligations as part of the British Empire under this convention, which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, c. 11 of the Statutes of Canada, 1919 (1st session), which with an amendment thereto, was consolidated in the Revised Statutes of Canada, 1927, as c. 43, under the title the Aeronautics Act. It is to be noted, however, that the Act does not by reason of its reproduction in the Revised Statutes take effect as a new law. The Governor General in Council, on December 31, 1919, pursuant to the Air Board Act, issued detailed " Air Regulations " which, with certain amendments, are now in force. By the National Defence Act, 1922, the Minister of National Defence thereafter exercised the duties and functions of the Air Board.

By these statutes and the Air Regulations, and the amendments thereto, provision is made for the regulation and control in a general and comprehensive way of aerial navigation in Canada, and over the territorial waters thereof. In particular, s. 4 of the Aeronautics Act purports to give the Minister of National Defence a general power to regulate and control, subject to approval by the Governor in Council (with statutory force and under the sanction of penalties on summary conviction), aerial navigation over Canada and her territorial waters, including power to regulate the licensing of pilots, aircraft, aerodromes and commercial services; the conditions under which aircraft may be used for goods, mails and passengers, or their carriage over any part of Canada; the prohibition (absolute or conditional) of flying over prescribed areas; aerial routes, and provision for safe and proper flying.

Their Lordships were told during the course of the argument that no Provincial Legislature had passed any such legislation, but that this had not prevented the progress of aeronautical development in the Provinces. It appears, for example, that in Ontario there has been established subject to these Regulations one of the most complete survey services in the Empire, and that it is working most harmoniously. Their Lordships are not aware that any practical difficulty has arisen in consequence of the general control of flying being in the hands of the Dominion, but at a conference at Ottawa between representatives of the Dominion Government and of the several Provincial Governments in November, 1927, a question was raised by the representatives of the Province of Quebec as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada—at all events in their application to flying operations carried on within a Province—and it was agreed that the question so raised was proper to be determined by the Supreme Court of Canada. Thereupon four questions were referred by His Excellency, the Governor General in Council, under an Order dated April 15, 1929, to the Supreme Court for hearing and consideration, pursuant to s. 55 of the Supreme Court Act, R. S. Can., 1927, c. 35, touching the respective powers under the British North America Act, 1867, of the Parliament and Government of Canada and of the Legislatures of the Provinces in relation to the regulation and control of aeronautics in Canada.

The determination of these questions depends upon the true construction of ss. 91, 92 and 132 of the British North America Act. Sect. 132 provides as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." It is not necessary to set out at length the familiar ss. 91 and 92 which deal with the distribution of legislative powers. Sect. 91 tabulates the subjects to be dealt with by the Dominion, and s. 92 the subjects to be dealt with exclusively by the Provincial legislatures, but it will not be forgotten that s. 91, in addition, authorizes the King by and with the advice and consent of the Senate and House of Commons of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces, and further provides that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the classes of matters of a local and private nature comprised in the enumeration of classes of subjects assigned by s. 92 exclusively to the legislatures of the Provinces.

The four questions addressed to the Court are as follows :—

"(1.) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the convention entitled 'Convention relating to the Regulation of Aerial Navigation ?'

(2.) Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province, necessary or proper for performing the obligations of Canada, or of any Province thereof, under the convention aforementioned within the meaning of s. 132 of the British North America Act, 1867 ?

(3.) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, c. 3, Revised Statutes of Canada, 1927 ?

(4.) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting : (*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences ; (*b*) the regulation, identification, inspection, certification, and licensing of all aircraft ; and (*c*) the licensing, inspection and regulation of all aerodromes and air stations ?"

We sympathize with the view expressed at length by Newcombe J., which was concurred in by the Chief Justice, as to the difficulty which the Court must experience in endeavouring to answer questions put to it in this way. It is true that the advisability of propounding for the consideration of the Court abstract questions or questions involving considerations of debatable fact is, to say the least, doubtful; and it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual with regard to parties who are not and who cannot be brought before it—for example, foreign governments. Their Lordships agree, however, with both these learned judges that the position must be accepted as expounded by Lord Haldane in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), where he says: "The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies."

The difficulty in the present case is accentuated by the comprehensive nature of the questions. For example, question 1 refers to the obligations of Canada under the Convention. That Convention contains forty-three articles and sixteen annexes, many of which contain a large number of sections dealing with hundreds of details relating to the marking of aircraft, certificates of airworthiness, lights, signals and rules of air traffic, visibility, maps, warnings and so forth. It would be extremely difficult for this Board to deal with every one of these many hundreds of topics in detail. So too, with regard to question 3, which asks whether the Parliament of Canada has legislative authority to enact in whole or in part the provisions of s. 4 of the Aeronautics Act. That section refers to a great number of topics, numbering nearly a hundred in all; take, for example (*f*), the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified. To deal with each one of these numerous alternatives would be impossible. The Board certainly has no desire, nor do they conceive it to be part of their function to act as draftsmen for Canadian Acts of Parliament. The Canadian parliamentary draftsmen are far more familiar with Canadian legislation than this Board is, and their Lordships cannot conceive it to be the wish of anybody that Acts of Parliament passed by the Senate and Commons of Canada should be referred wholesale to this Board in order to determine without reference to particular facts whether or not it was competent for Parliament to pass upon the hundred and one matters for which they have legislated.

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(1) [1914] A. C. 153, 162.

The Supreme Court felt, as their Lordships feel, the difficulty first of appreciating the questions and then of answering them. This is shown by the form of the answers as returned on the judgment now under review. To question 1 as framed (note the words "as framed"), the Court unanimously answered "No." The Chief Justice in his judgment says: "I agree with the view of my brother Smith that if the question is to be answered in the affirmative the word 'paramount' must be substituted for 'exclusive.' It might be also be better to insert the words 'as part of the British Empire, towards foreign countries' immediately after the word 'thereof,' so as definitely to limit the question and answer to the very matter dealt with by s. 132." To question 2 the answer of the majority of the Court was: "Construing the word 'generally' in the question as equivalent to 'in every respect' the answer is 'No.'" To question 3 the answer of the majority of the Court was "Construing the question as meaning, 'is the section mentioned, as it stands, validly enacted?' the answer is 'No,' but if the question requires the Court to consider the matters in the enumerated sub-heads of s. 4 of the statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the judges." To question 4 the answers are to be ascertained from the individual opinions or reasons certified by the judges. Duff J., in his opinion, which was concurred in by Rinfret and Lamont JJ., went into the matter with very great particularity, as will appear by the following quotation. Referring to question 4, sub-head (*b*), he says: "Regulations 3, 4, 124 (2.), and 10 would be invalid. Regulations 5 and 6 would be valid. Regulations 7, 8, 9, 11, 15, 16 and 17 are subsidiary regulations, which would be valid if associated with a valid principal regulation. Sub-sections 1 and 3 of regulation 12 would be valid, and sub-s. 2 of that regulation invalid."

The soundness of these answers is challenged in the present appeal except in the case of the answer to the second question which the Board was expressly informed was not submitted for review. In the case for the appellant the Attorney-General of Canada says that he "does not consider it to be desirable or necessary to press for a review on the present appeal of the answer given by the Supreme Court of Canada to question 2. The argument on behalf of the Attorney-General for Canada on the present appeal and the terms of this case will accordingly be confined to questions 1, 3 and 4." Their Lordships were, however, informed by the learned counsel who conducted the appeal on behalf of the Dominion that "when the Dominion decided to omit a discussion with regard to question 2 from its factum and from its case before this Board, it was not because it was adopting the answer and saying 'this is accepted, and on the assumption that this view as to question 2 is right, tell us the answers to the others only.' It was merely that the question had provoked a great deal of discussion in the Supreme Court at Ottawa as to what its precise meaning was and what was the effect of the word 'generally' as used in it, whether it meant 'in every respect' or whether it meant 'speaking broadly' . . . . it was thought that might be avoided here by submitting questions 1, 3 and 4, to your Lordships, because answers to those would, in the view of the Dominion, solve the questions and really be a sufficient answer to question 2," and he added, "there is one element only that need be referred to—namely military aircraft. They are not under the Convention at all and the Act deals with military aircraft. Therefore, it could not possibly be said that the Convention was a justification for the whole Air Board Act and the Regulations which go with it in respect of military aircraft, and therefore the answer technically would be 'No.'"

This being the position when the matter was argued before the Board, their Lordships think that the clearest way in which to express their opinion would be to answer the questions immediately and then to give their reasons for these answers; but before doing so, it is necessary to point out that their Lordships are not concerned with any theoretical matters. They conceive themselves to be asked specific questions about specific legislation.

To question 1, and retaining the word "exclusive," the Board's answer is "Yes."

To question 3, their answer is also "Yes."

To question 4, their answer is again "Yes."

Before discussing the several questions individually, it is desirable to make some general observations upon ss. 91 and 92, and 132.

With regard to ss. 91 and 92, the cases which have been decided on the provisions of these sections are legion. Many inquests have been held upon them, and many great lawyers have from time to time dissected them.

Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.

To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might ✓

be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.

While the decisions which the Board has pronounced in the many constitutional cases which have come under their consideration from the Dominion must each be regarded in the light of the facts involved in it, their Lordships recognize that there has grown up round the British North America Act a body of precedents of high authority and value as guides to its interpretation and application. The useful and essential task of taking stock of this body of authority and reviewing it in relation to the original text has been undertaken by this Board from time to time and notably, for example, in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1); *Attorney-General for Canada* v. *Attorney-General of Ontario* (2); *City of Montreal* v. *Montreal Street Ry.* (3); and in the same year *Attorney-General for Ontario* v. *Attorney-General for Canada.* (4) In all these four cases the scope of the two sections was carefully considered, but it is not necessary to cite them at length because so recently as last year this Board reviewed them in the case of *Attorney-General for Canada* v. *Attorney-General for British Columbia* (5), and laid down four propositions relative to the legislative competence of Canada and the Provinces respectively as established by the decisions of the Judicial Committee. These propositions are as follows :— ✓

1. The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial legislatures by s. 92.

2. The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance,

(1) [1896] A. C. 348.
(2) [1898] A. C. 700.
(3) [1912] A. C. 333.
(4) [1912] A. C. 571.
(5) [1930] A. C. 111, 118.

and must not trench on any of the subjects enumerated in s. 92, as within the scope of Provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion.

3. It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91.

4. There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

Their Lordships particularly emphasize the second and third of these categories, and refer to the remarks made by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), where he says: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada." Further, their Lordships desire to refer to *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (2), where it was held that the Canadian War Measures Act, 1914, and certain Orders in Council made thereunder during the War were intra vires of the Dominion. Lord Haldane there said: "The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances

(1) [1896] A. C. 348, 361.

(2) [1923] A. C. 695, 704, 706.

of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole." These remarks must again be taken subject to the situation then prevailing, for he adds later: "It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for the distribution of powers in the ruling instrument would have to be invoked."

It is obvious, therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

During the course of the argument, learned counsel on either side endeavoured respectively to bring the subject of aeronautics within s. 91 or s. 92. Thus, the appellant referred to s. 91, item 2 (the regulation of trade and commerce); item 5 (postal services); item 9 (beacons); item 10 (navigation and shipping). Their Lordships do not think that aeronautics can be brought within the subject navigation and shipping, although undoubtedly to a large extent, and in some respects, it might be brought under the regulation of trade and commerce, or the postal services. On the other hand, the respondents contended that aeronautics as a class of subject came within item 13 of s. 92 (property and civil rights in the Provinces) or item 16 (generally all matters of a merely local and private nature in the Provinces). Their Lordships do not think that aeronautics is a class of subject within property and civil rights in the Provinces, although here again, ingenious arguments may show that some small part of it might be so included.

In their Lordships' view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder. By article 1 the high contracting parties recognize that every Power (which includes Canada) has complete and exclusive sovereignty over the air space above its territory; by article 40, the British Dominions and India are deemed to be States for the purpose of the Convention.

The following appear to be among the principal obligations undertaken by Canada as part of the British Empire under the stipulations of the Convention:—

1. The obligation not to permit (except by special and temporary authorization or under a special convention) the flight above its territory of an aircraft which does not possess the nationality of a contracting State, and indirectly, registration being the only means by which nationality is acquired, the obligation to require registration of any aircraft owned by a Canadian national and intended to be flown. (Arts. 5, 6 and 7.)
2. The obligation to see that no discrimination is made between its private aircraft (see Art. 30) and those of

J. C.
1931

THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

the other contracting States in regard to prohibition of flying over certain areas of its territory and that the locality and extent of the prohibited areas are published and notified beforehand to the other contracting States. (Art. 3.)

3. The obligation to require all aircraft engaged in international navigation to bear their nationality and registration marks as well as the name and residence of the owner, in accordance with annex A. (Art. 10.)
4. The obligation to require every aircraft engaged in international navigation to be provided, in accordance with the conditions laid down in annex B, with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses, i.e., in the case of Canadian aircraft by the Dominion. (Art. 11.)
5. The obligation to require the commanding officer, pilots, engineers and other members of the operating crew of every aircraft to be provided, in accordance with the conditions laid down in annex E, with certificates of competency and licences issued by the State whose nationality the aircraft possesses, i.e., in the case of Canadian aircraft by the Dominion. (Art. 12.)
6. The obligation to see that no wireless apparatus is carried on any aircraft without a special licence issued by the State whose nationality the aircraft possesses, i.e., in the case of Canadian aircraft without a special licence issued by the Dominion, and that no such apparatus is operated except by members of the crew provided with a special licence for the purpose; also to require every aircraft used in public transport and capable of carrying ten or more persons to be equipped with sending and receiving wireless apparatus. (Art. 14.)
7. The obligation to exempt foreign aircraft within Canada from any seizure on the ground of infringement of

patent, design or model, subject to the deposit of security. (Art. 18.)

8. The obligation to require every aircraft engaged in international navigation to be provided with the documents specified in Art. 19.
9. The obligation to afford aircraft of contracting States, within Canada, the same measures of assistance for landing, particularly in case of distress, as national aircraft. (Art. 22.)
10. The obligation to require every aerodrome within Canada, which is open to public use by national aircraft, to extend the same facilities to aircraft of all the other contracting States under the same tariff of charges. (Art. 24.)
11. The obligation to require every aircraft flying within Canada and every national aircraft, wherever it may be, to comply with the regulations contained in annex D, relative to the rules as to lights and signals and air traffic.
12. The obligation to prohibit the carriage by aircraft, in international navigation, of explosives and of arms and munitions of war, and to prohibit foreign aircraft from carrying such articles between any two points within Canada.

Canada also undertakes to observe the regulations contained in a great number of annexes. Annex A deals in many sections with the marking of aircraft ; annex B with certificates of airworthiness ; annex C with log books ; annex D with lights, signals and rules for air traffic ; annex E with minimum qualifications necessary for obtaining certificates as pilots ; annex F with maps and ground markings ; annex G has eight parts dealing with meteorological information, visibility, messages, radio-telephony, synoptic charts, skeleton maps, information on aerodromes, warnings, ground signals ; and annex H with customs.

It is therefore obvious that the Dominion Parliament, in order duly and fully to " perform the obligations of Canada or of any Province thereof " under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.

To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

For these reasons their Lordships have come to the conclusion that it was competent for the Parliament of Canada to pass the Act and authorize the Regulations

J. C.
1931
THE REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re.*

in question, and that questions 1, 3 and 4, which alone they are asked to answer, should be answered in the affirmative.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1931
Oct. 22.

KOSSEKECHATKO AND OTHERS . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR TRINIDAD RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Extradition—Convicted Criminal—French Extradition Treaty, 1876 *—Absence of Proof that Crime committed in France—Irregularities in Magistrate's Order—Entry in Magistrate's Book—Summary Conviction Offences (Procedure) Ordinance (Revised Laws of Trin. and Tob.,* 1925, *c.* 24), *ss.* 11, 12*—French Guiana Extradition Ordinance (Revised Laws of Trin. and Tob.,* 1925, *c.* 250), *s.* 5*—Extradition Act,* 1870 (33 & 34 *Vict. c.* 52), *s.* 10.

The appellants were brought before a magistrate in Trinidad under s. 5 of the French Guiana Extradition Ordinance of Trinidad charged with being fugitive criminals from French Guiana, where there is a penal settlement. At the hearing it was proved that they had each been convicted in France of a specified crime, and had each received a sentence of imprisonment which was unexpired. The magistrate made an entry in his magistrate's book against their names "extradition ordered." He did not however make, as he should have done, an order under s. 10 of the Extradition Act, 1870 (made applicable by s. 5 of the Ordinance), for committal to await the Governor's warrant for surrender. Instead another magistrate, who had not heard the case, made a detention order under s. 3 of the Ordinance, which section applies to suspected fugitives. Upon habeas corpus proceedings:—

Held, that the appellants should be released: (1.) because under the terms of the extradition treaty with France they could be extradited only if the crimes of which they had been convicted were committed in French territory, and there was no evidence that that was so, nor was it necessarily involved in the convictions; (2.) because ss. 11 and 12 of the local Summary Conviction Offences (Procedure) Ordinance did not make the entry in the magistrate's book equivalent to an order under s. 10 of the Extradition Act, 1876, and the irregularities with regard to the order signed prevented the detention of the appellants from being warranted.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Ex parte Servini [1914] 1 K. B. 77 distinguished.

Judgment of the Supreme Court of Trinidad and Tobago reversed.

APPEAL (No. 17 of 1931), by special leave, in forma pauperis from a judgment of the Supreme Court of Trinidad and Tobago (Trinidad) delivered on November 25, 1930.

The judgment appealed from discharged writs of habeas corpus ad subjiciendum moved for on behalf of the three appellants and others, and remanded them in custody under an order dated November 6, 1930. All the persons in question were alleged to be fugitive convicts from the penal settlement in French Guiana.

The facts of the case, together with the material provisions of the Extradition Act, 1870, the extradition treaty of 1876 between Great Britain and France, the French Guiana Extradition Ordinance (Revised Laws of Trinidad and Tobago, 1925, c. 250), and the Summary Conviction Offences (Procedure) Ordinance (c. 24 of the above Revised Laws), are all fully stated in the judgment of the Judicial Committee. Conventions of February 13, 1896, and October 17, 1908, modified the treaty but did not affect the questions raised.

1931. July 24, 27. *Pritt K.C.* and *Horace Douglas* for the appellants. There are four grounds upon each of which the appellants are entitled to release. First, under the terms of art. I. of the treaty the appellants could be extradited only upon proof that the crimes of which they were convicted were committed in French territory. That is supported by the terms of arts. IV. and XII. [Reference was made also to the Extradition Act, 1870, ss. 2, 5, 6, 26 (definitions), and to *Reg.* v. *Levauder* (1) and *Reg.* v. *Ashforth.* (2)] There was no evidence in this case as to where the crimes were committed. A conviction in France does not necessarily involve that the crime was committed in French territory; that is made clear by the affidavit of an expert in French law. Secondly, it was necessary to show not only that the appellants had been convicted of a crime specified in the French version of the treaty, but also that the acts if committed in England would have constituted crimes mentioned in the Extradition Acts; for that purpose the English version of the treaty cannot be treated as a translation of the French version: *In re Arton* (No. 2). (1) In the present case the evidence showed that the appellants respectively had been convicted of "meurtre," "complicité de meurtre, vols qualifiés et complicité," and "vol avec violences." It was not shown that any of these technical terms of the French criminal law involved an "extradition crime" within s. 26 of the Extradition Act, 1870. For instance, "meurtre" is not accurately represented by "murder." Thirdly, no order was made under s. 10 of the Extradition Act, 1870, which is made applicable to proceedings under s. 5 of the Ordinance. The order actually signed was an order under s. 3, sub-s. 3, of the Ordinance and was inappropriate. Fourthly, the order was not signed by the magistrate who heard the case. Although the person who signed it was a magistrate, he had not heard the case and had no jurisdiction in the matter.

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(1) (1881) 13 Cox C. C. 329.

(2) (1892) 8 Times L. R. 283.

Hon. Sir Stafford Cripps S.-G. and *Kenelm Preedy* for the respondent. The words "in the territory of one party" in art. I. of the treaty refer to the place of conviction; that is shown by art. VII. (B), which provides that the warrant in support of a requisition is to state "the fact, place and date of the conviction." In the case of a convicted person it was necessary to prove merely a conviction in France. Under s. 26 of the Extradition Act, 1870, all that is necessary is conviction of an extradition crime committed within the jurisdiction. The conviction itself establishes the jurisdiction, at any rate in the absence of evidence of want of jurisdiction. The second ground urged has no substance,

(1) [1896] 1 Q. B. 509.

J. C.
1931
KOSSEKECHATKO
v.
ATTORNEY-GENERAL
FOR
TRINIDAD.

and was not put forward before the Supreme Court. There was evidence before the magistrate of the meaning of the French expressions used, and though the witness was cross-examined it was not suggested that the translations were inaccurate. By s. 9 of the Extradition Act, 1870, it was for the appellants to show that the crimes of which they were convicted were not extradition crimes. It is further submitted that under s. 5 of that Act the terms of the English version of the treaty contained in the Order in Council prevailed. Under ss. 11 and 12 of the local Summary Conviction Offences (Procedure) Ordinance, the entry in the magistrate's book was equivalent to an order under s. 10 of the Extradition Act. The actual signing of a formal order could be by another magistrate as the clerk of the Court. The form of order provided in the Ordinance is not made obligatory. The order actually signed, although not the appropriate order, was one which could have been made, and it authorized the detention of the appellants until the Governor's pleasure was known. The irregularities were not such as to entitle the appellants to release: *Ex parte Servini* (1); *Ex parte Krans* (2); *Rex* v. *Marks* (3); *Bethell's* case. (4)

Their Lordships intimated that they would humbly advise that the appeal should be allowed; the reasons would be stated later.

Oct. 22. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. In this case an appeal was brought before the Board, by special leave, from a judgment of the Supreme Court of Trinidad and Tobago, given on November 25, 1930. This judgment discharged two writs of habeas corpus ad subjiciendum, and remanded certain persons (including the appellants) to be detained in custody, under a warrant dated November 6, 1930.

Their Lordships, at the conclusion of the arguments, intimated that they would humbly advise His Majesty that

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(1) [1914] 1 K. B. 77.
(2) (1823) 1 B. & C. 258.
(3) (1802) 3 East 157.
(4) (1696) 1 Salk. 348.

J. C.
1931
KOSSEKE-CHATKO
v.
ATTORNEY-GENERAL FOR TRINIDAD.

the appeal should be allowed, and that the appellants should be released from custody. They further stated that they would give their reasons at a later date, and this they now proceed to do.

On August 7, 1930, a party of nine men landed at Chatham, in the island of Trinidad, from a small boat. The three appellants were members of the party. They had, they said, come from the French penal settlement at Cayenne, French Guiana. The whole party was immediately arrested under the French Guiana Extradition Ordinance, hereinafter mentioned, and brought before a magistrate, as thereby provided.

Before completing the narration of the facts which led up to the appeal to His Majesty in Council, it is necessary to explain what are the provisions which apply to and regulate the extradition from Trinidad of fugitive criminals from French Guiana, and the procedure in relation thereto.

The Extradition Act, 1870, is the principal Act of the Imperial Parliament relating to the surrender to foreign states of fugitive criminals, and it is under or by virtue of that Act that the present appellants would, if at all, be liable to be detained in custody under the warrant before referred to. The relevant provisions of this Act need careful attention accordingly.

The definition section (s. 26) declares that in the Act "unless the context otherwise requires: The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to the Act.

"The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; and the term 'fugitive criminal of a foreign state' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state."

Sect. 2 provides that where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that the Act shall apply in the case of such foreign state.

Sect. 6 is the foundation of the jurisdiction against the appellants. It enacts that where the Act applies in the case of a foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the Order applying the Act (as the case may be), "shall be liable to be apprehended and surrendered in manner provided by this Act."

Sects. 7 to 12 inclusive contain the provisions under which a fugitive criminal who is in the United Kingdom may be apprehended and ultimately surrendered or discharged out of custody.

The Secretary of State may (after requisition from a foreign state for surrender of a fugitive criminal) by order require a police magistrate to issue a warrant for the apprehension of the fugitive criminal (s. 7). A warrant for the apprehension of a fugitive criminal may be issued by a police magistrate on receipt of the said order, and on such evidence as is provided for in s. 8, and (without such order) by a police magistrate or any justice of the peace in the circumstances and manner specified in the same section. In either case the fugitive must be brought before a police magistrate. Sect. 9 provides that the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. Sect. 10 contains, in regard to a fugitive criminal who is a convict, the following provision: "In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

The criminal, if committed, is committed to prison, there to await the warrant of a Secretary of State for his surrender.

Sect. 11 provides for an interval of fifteen days between committal and surrender, to enable an application to be made for a writ of habeas corpus. Upon the expiration of the fifteen days, or after the decision of the Court upon the return to the writ, as the case may be, the Secretary of State may, by warrant, order the fugitive criminal to be surrendered. Sect. 12 provides for the discharge out of custody of fugitive criminals who have been committed, if not surrendered and conveyed out of the United Kingdom within two months after such committal.

Sect. 17 relates to proceedings as to fugitive criminals in British possessions. It provides that the Act, when applied by Order in Council, shall, unless it is otherwise provided by such Order, extend to every British possession in the same manner as if throughout the Act the British possession were substituted for the United Kingdom or England, as the case may require, but with certain modifications. One of these modifications is that no warrant of a Secretary of State shall be required, and that all powers vested in or acts authorized or required to be done under the Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone.

Sects. 18 and 25 are in the following terms :—

" 18. If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by any subsequent order, either suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer ; or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

J. C.
1931
Kossekechatko v. Attorney General for Trinidad.

"25. For the purposes of this Act, every colony, dependency and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state."

In the year 1877 the Legislature of Trinidad enacted an Extradition Ordinance, s. 2 of which ran thus: "2. All powers vested in and acts authorized or required to be done by a police magistrate or any justice of the peace in relation to the surrender of fugitive criminals in the United Kingdom under 'The Extradition Acts, 1870 and 1873,' are hereby vested in and may in the colony be exercised and done by any magistrate, in relation to the surrender of fugitive criminals under the said Acts."

This Ordinance was not to come into operation until Her Majesty should, by Order in Council, direct that it should have effect within the colony as if it were part of the Extradition Act, 1870.

By an Order in Council dated July 11, 1877, it was directed (pursuant to the second alternative in s. 18 of the Extradition Act, 1870) that the said Ordinance should have effect in the colony of Trinidad without modification or alteration as if it were part of the Extradition Act, 1870.

On April 8, 1878, ratifications were exchanged of a treaty for the mutual extradition of fugitive criminals, which had, on August 14, 1876, been concluded between Her late Majesty and the President of the French Republic, and on May 16, 1878, an Order in Council was made whereby after reciting the Extradition Act, 1870, and the Act to amend the same passed in the year 1873, and after reciting the treaty, it was ordered that from and after May 31, 1878, the said Acts should apply in the case of the said treaty.

The relevant provisions of the treaty are as follows:—

"ARTICLE I.

"The High Contracting Parties engage to deliver up to each other those persons who are being proceeded against or who have been convicted of a crime committed in the territory of the one Party, and who shall be found within the territory of the other Party, under the circumstances and conditions stated in the present treaty.

" ARTICLE IV.

" The present Treaty shall apply to crimes and offences committed prior to the signature of the Treaty ; but a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted.

" ARTICLE VII.

" In the dominions of Her Britannic Majesty, other than the Colonies or Foreign Possessions of Her Majesty, the manner of proceeding shall be as follows :—

" (A) In the case of a person accused : The requisition for the surrender shall be made to Her Britannic Majesty's Principal Secretary of State for Foreign Affairs by the Ambassador or other Diplomatic Agent of the President of the French Republic, accompanied by a warrant of arrest or other equivalent judicial document, issued by a judge or magistrate duly authorized to take cognizance of the acts charged against the accused in France, together with duly authenticated depositions or statements taken on oath before such judge or magistrate, clearly setting forth the said Acts, and containing a description of the person claimed, and any particulars which may serve to identify him. The said Secretary of State shall transmit such documents to Her Britannic Majesty's Principal Secretary of State for the Home Department, who shall then, by order under his hand and seal, signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive. On the receipt of such order from the Secretary of State, and on the production of such evidence as would, in the opinion of the magistrate, justify the issue of the warrant if the crime had been committed in the United Kingdom he shall issue his warrant accordingly. When the fugitive shall have been apprehended, he shall be brought before the police magistrate who issued the warrant, or some other police magistrate in London. If the evidence to be then produced shall be such as to justify, according to the law of England, the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison to await the warrant of the Secretary of State for his surrender; sending immediately to the Secretary of State a certificate of the committal and a report upon the case. After the expiration of a period from the committal of the prisoner, which shall never be less than fifteen days, the Secretary of State shall, by order under his hand and seal, order the fugitive criminal to be surrendered to such person as may be duly authorized to receive him on the part of the President of the French Republic.

"(B) In the case of a person convicted: The course of proceeding shall be the same as in the case of a person accused, except that the warrant to be transmitted by the Ambassador or other Diplomatic Agent in support of his requisition shall clearly set forth the crime of which the person claimed has been convicted, and state the fact, place and date of his conviction. The evidence to be produced before the police magistrate shall be such as would, according to the law of England, prove that the prisoner was convicted of the crime charged.

"ARTICLE XII.

"If the individual claimed by one of the two High Contracting Parties in pursuance of the present treaty should be also claimed by one or several other Powers, on account of other crimes committed upon their respective territories, his surrender shall be granted to that State whose demand is earliest in date; unless any other arrangement should be made between the Governments which have claimed him, either on account of the gravity of the crimes committed, or for other reasons.

"ARTICLE XVI.

"In the Colonies and Foreign Possessions of the two High Contracting Parties the manner of proceeding shall be as follows: The requisition for the surrender of a fugitive criminal who has taken refuge in a Colony or Foreign Possession of either Party, shall be made to the Governor or chief authority of such Colony or Possession by the chief Consular Officer of the other in such Colony or Possession; or, if the fugitive has escaped from a Colony or Foreign Possession of the Party on whose behalf the requisition is made, by the Governor or chief authority of such Colony or Possession. Such requisitions may be disposed of, subject always, as nearly as may be, to the provisions of this Treaty, by the respective Governors or chief authorities, who, however, shall be at liberty either to grant the surrender or to refer the matter to their Government. The foregoing stipulations shall not in any way affect the arrangements established in the East Indian Possessions of the two countries by the IXth Article of the Treaty of March 7, 1815."

In 1894 the Legislature of Trinidad enacted an Ordinance known as the French Guiana Extradition Ordinance, which was to come into operation and take effect only after Her Majesty should, by Order in Council, direct that it should have effect in the colony, and after such Order in Council should have been published in the official Gazette.

The relevant provisions of this Ordinance are of the first importance in the present case, and must now be referred to:—

"2. In this Ordinance—. . . . 'Extradition Acts' means 'The Extradition Acts, 1870 and 1873,' and includes any Act of Parliament hereafter to be passed relating to the extradition of persons accused or convicted of crime; 'Fugitive criminal' means any person accused or convicted of any crime in respect of which extradition may be lawfully granted under the provisions of any Order in Council applying the Extradition Acts who may be lawfully surrendered under the provisions of any Order in Council applying the said Acts as regards the Colonies and Foreign Possessions of France;

"3.—(1.) Any constable may arrest and detain any person whom there is reasonable cause to suspect of being a fugitive from French Guiana.

"(2.) Every person so arrested and detained shall be brought before a magistrate as soon after the arrest as may be practicable, and, if it appear from the evidence adduced that there is reasonable cause to suspect that such person is a fugitive criminal from French Guiana, it shall be lawful for such magistrate to call upon such person to declare: (*a*) his name and the country to which he belongs or is subject; (*b*) the port or place from whence he came; (*c*) the vessel by which, and the day on which, he arrived in the colony; and for the purpose of identification to order such person to be photographed.

"(3.) If such person fails to make it appear to the satisfaction of such magistrate that he is not a fugitive criminal from French Guiana, the magistrate shall thereupon order that such person shall be detained in custody until the Governor's pleasure be known, and shall thereupon issue his order of detention, which may be in the form contained in the schedule to this Ordinance or in such other form as the circumstances may require.

"(4.) The person referred to in any such order may be detained in custody thereunder for any period not exceeding three months, but for no longer period; and may, during such period, be detained in any prison, constabulary station, or convenient place, and may from time to time be removed from any one place to any other by order of the Inspector-General or any magistrate.

"4. Where requisition is made for the extradition of any person who is detained in custody under the provisions of this Ordinance, the same proceedings in all respects shall be taken as if such person were not so detained.

"5.—(1.) Where requisition is made by the Governor of French Guiana for the surrender of a fugitive criminal, the Governor may, by order under his hand, signify to a magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal; and thereupon such magistrate, if the fugitive criminal is brought before him, shall hear the case and shall have the like jurisdiction and powers as are given to police magistrates and justices of the peace under the Extradition Acts.

"(2.) If the magistrate commits any such fugitive criminal to prison there to await the warrant of the Governor for the surrender of such fugitive criminal, he shall forthwith send to the Governor a certified copy of all the proceedings together with the photograph of such fugitive criminal, a certificate of the committal, and such report upon the case as he may think fit.

"7. Any extract purporting to be an extract from any register of convicted criminals in French Guiana giving a description of the criminal, and stating the particulars of conviction, the crime of which the criminal was convicted, the sentence passed on the convicted criminal, and the date thereof, or stating any of such particulars, if authenticated by a seal purporting to be the seal of the Governor of French Guiana, may be received in any proceedings relating to the extradition of any person alleged to be a fugitive criminal from French Guiana as prima facie evidence of all the facts therein set forth."

By an Order in Council made on November 20, 1894, and published in the official Gazette of December 26, 1894, it was directed that this Ordinance should have effect in the colony of Trinidad without modification or alteration, as if it were part of the Extradition Act, 1870. This Ordinance is now c. 250 of the Laws of Trinidad and Tobago (Revised Edition), 1925, and is hereafter referred to as the Ordinance of 1894.

These being the documents which contain the conditions of, and the procedure relating to, the extradition from Trinidad of fugitive criminals from French Guiana, it will be convenient at this stage to summarize the effect of them: (1.) If there is reasonable cause to suspect a person in Trinidad of being a fugitive from French Guiana, any constable may arrest him. (2.) That person shall be brought before a magistrate in Trinidad, and if he fails to satisfy the magistrate that he is not a fugitive criminal from French Guiana, the magistrate must order that he be detained in custody until the Governor's pleasure be known, and must issue his detention order accordingly. (3.) Detention under this order may not exceed three months. (4.) If requisition is made by the Governor of French Guiana for the surrender of a fugitive criminal, the Governor of Trinidad may require a magistrate to issue his warrant for the apprehension of the fugitive criminal. (5.) Upon issue of the magistrate's warrant the person (even though already detained in custody under a detention order) is apprehended and brought before the magistrate, and thereupon ss. 9 and 10 of the Extradition Act, 1870, come into play. (6.) The magistrate, having heard the case, must either commit the person to prison or order him to be discharged. If (in the case of a convict) such evidence is produced as would, according to the law of England, prove that the prisoner was convicted of an extradition crime, the magistrate must commit, otherwise he must discharge. (7.) If the magistrate commits he must commit the fugitive criminal to prison, there to await the warrant of the Governor for his surrender.

The narrative of the facts in the present case may now be resumed.

The nine men, having been arrested under s. 3, sub-s. 1, of the Ordinance of 1894, were brought before a magistrate under s. 3, sub-s. 2, of that Ordinance. After certain remands the matter was dealt with on August 14, 1930, upon evidence, which included the evidence of the prisoners themselves. In the result the magistrate (Mr. Perez) made an order (dated August 14, 1930), under s. 3, sub-s. 3, of the said Ordinance, ordering that the nine men " be detained in custody until the Governor's pleasure be known."

Down to this point the proceedings were regular, and no fault is, or could be, found therewith. If nothing further had happened the detention in custody would, after three months, have ceased. The efficacy of the order would have come to an end on November 14, 1930.

Subsequently, however, the Governor of French Guiana made a requisition for the surrender of eight of the men, including the three appellants, and thereupon the Governor of Trinidad, under s. 5 of the Ordinance of 1894, by order

J. C.
1931
KOSSEKECHATKO
v.
ATTORNEY-GENERAL FOR TRINIDAD.

dated October 30, 1930, required the magistrate to issue his warrant for the apprehension of the eight men. On November 4, 1930, the magistrate (Mr. Perez) issued his warrant accordingly, commanding that the eight men be apprehended and brought before him or some other magistrate, to show cause why they should not be surrendered in pursuance of the Extradition Acts.

On November 6, 1930, the eight men were brought before Mr. Perez, and were charged with being fugitive criminals from French Guiana. The conviction of each man seems to have been sought to be proved by documents authenticated by the seal of the Governor of French Guiana, and said to fall within the provisions of s. 7 of the Ordinance of 1894. From them it would appear that the appellant Caullier was convicted in France of "vol avec violences," that the appellant Kossekechatko was convicted in France of "meurtre," and that the appellant Retzenger was convicted in France of "complicité de meurtre, vols qualifiés et complicité." These documents were produced by Emmanuel Emerand Mouttet, a solicitor in the Supreme Court of Trinidad and Tobago. This gentleman was sworn both as an interpreter and as a witness, and he, in his evidence, translated the above offences as "robbery with violence," "murder" and "complicity to murder and housebreaking" respectively. That was the only evidence in relation to the crimes for which the men had been convicted.

Having heard the evidence and arguments, Mr. Perez would seem to have considered that the case had, as against each of the eight men, been made out; in other words, that, in accordance with the requirements of the second paragraph of s. 10 of the Extradition Act, 1870, it was proved that the prisoner was convicted of an extradition crime. That this was his view is shown by an entry signed by him in the magistrate's case book for November 6, 1930, opposite the names of the eight prisoners—namely, "Extradition ordered, all informed that they will not be surrendered until after the expiration of 15 days, during which time they may apply for a writ of habeas corpus."

J. C.
1931

KOSSEKECHATKO
v.
ATTORNEY-GENERAL
FOR
TRINIDAD.

The next step to be taken was clear. It was for Mr. Perez to sign a warrant or order committing each of the eight men to prison there to await the warrant of the Governor for his surrender, and this under the joint operation of s. 10 of the Extradition Act, 1870, and s. 5 of the Ordinance of 1894. This course was not pursued. What in fact happened was that another magistrate (Mr. Harris), who had not heard the case, made an order under his hand, dated November 6, 1930, which recited that it appeared to him that there was reasonable cause to suspect that the eight men were fugitive criminals from French Guiana, and ordered that they be detained in custody until the Governor's pleasure be known. This was a detention order under s. 3, sub-s. 3, of the Ordinance of 1894.

Applications by motion on behalf of the appellants (and others) for writs of habeas corpus were made to the Supreme Court. These motions were heard on November 21, 1930, on which day the Court ordered the writs to issue as a matter of convenience, but not as finally deciding the question. Writs were accordingly issued returnable on November 25, 1930.

On the return to the writs the only warrant alleged for the detention in custody was Mr. Harris' order of November 6, 1930. The arguments were resumed and concluded on November 25, 1930, on which day the judgment of the Court was delivered, discharging the writs and remanding the prisoners to custody. It is from this judgment that an appeal was, by special leave, brought before their Lordships' Board on behalf of the three appellants.

It was contended on their behalf before this Board that they ought to have been discharged from custody because there was no valid order or warrant authorizing their detention, the order of November 6, 1930, which was the only authority in that behalf, being invalid on four grounds, namely: (*a*) That it had not been proved as to any of the appellants that he was convicted of an extradition crime, i.e., that there was no evidence, or no sufficient evidence, that he had committed a crime which, if committed in England or within English jurisdiction, would be one of the extradition crimes described in the Extradition Acts, 1870 and 1873. (*b*) That there was no evidence as to any of the appellants that he had been convicted of a crime committed in the territory of the French Republic. (*c*) That there never existed as to any of the appellants any order under s. 10 of the Extradition Act, 1870, the order of November 6, 1930, being an order for detention under s. 3, sub-s. 3, of the Ordinance of 1894, and not an order for committal to prison under s. 10 of the Extradition Act, 1870, and (*d*) That even if the said order could be said to be an order for committal to prison under s. 10 of that Act, it was made by a person who had never heard the case, and who, therefore, had no power to make it.

In regard to the first contention, the underlying question was the necessity of establishing by affirmative and sufficient evidence not merely that the fugitive criminal had been convicted in France of a crime falling within the crimes described in the French version of the treaty schedule, but that such conviction necessarily involved the commission by him of that which, if committed in England or within English jurisdiction, would be one of the crimes described in the Extradition Acts, 1870 and 1873. It may be that in the present case it could be said that the evidence of Mr. Mouttet was sufficient for this purpose. However that may be, their Lordships, having regard to the views which they hold in relation to the other contentions in the case, do not deem it necessary to express any opinion as regards either the necessity for such evidence, or the sufficiency of the evidence which was adduced in the present case.

The second contention involves the consideration of two matters—namely: (*a*) Whether upon the true construction of the treaty it covers a crime not committed in the territory of the French Republic; and (*b*) whether it was proved in the present case, as regards each appellant, that the crime of which he was convicted was, in fact, committed in that territory.

Upon the true construction of the treaty their Lordships feel no doubt that art. I. (which is the crucial article) relates only to crimes committed within the territory of the Power which is seeking extradition. It was suggested by the

Solicitor-General that the words "in the territory" refer to the locality of the proceedings and conviction, and not to the locality of the commission of the crime. In support of this view he pointed to art. VII. (B), which did not require that the warrant there mentioned should state the place where the crime was committed. The Supreme Court relied upon this fact as disposing of the point; but while appreciating the force of the argument, their Lordships feel unable to escape from the plain words of art. I., which, as a matter of grammar, clearly refer to convicted persons as persons "who have been convicted of a crime committed in the territory of the one party." This view as to what might be termed the territoriality of the crime, is borne out, not only by the French version of art. I., but also, their Lordships think, by arts. IV. and XII., and their references to crimes committed in the country or the territory of a Power which is seeking extradition. In their Lordships' opinion no one of the appellants was liable to be extradited under the treaty, unless the crime of which he was convicted was, in fact, committed within the territory of the French Republic.

This being the case it next falls to be considered whether this essential fact was proved. It is admitted that no such proof was tendered in the case of any of the appellants. Nevertheless, it might have been unnecessary to do so, if it could have been shown that under French law no conviction in France of any of the appellants would have been possible unless the crime of which he had been convicted had, in fact, been committed in French territory. Any doubt which might have existed upon this point has been removed at the hearing before this Board; for the affidavit of Monsieur Frederick Allemés makes it clear that, in the case of each appellant, his conviction in France did not necessarily involve that the crime of which he had been convicted had been committed in the territory of the French Republic.

The omission to prove this essential fact (if it be the fact) is, in their Lordships' opinion, fatal to the validity of the order of November 6, 1930, even if in other respects it were beyond reproach.

J. C.
1931
Kossekechatko
v.
Attorney-General for Trinidad.

The remaining contentions of the appellants reveal, however, other reasons for holding that the said order was invalid. It is open to attack on two further grounds. It was the wrong order to make, and it was made by the wrong person. The only order which could be made at that particular stage was an order (under s. 10 of the Extradition Act, 1870) for committal to await the Governor's warrant; instead of that the order made was an order (under s. 3, sub-s. 3, of the Ordinance of 1894) for detention. Even if it were possible to overlook this irregularity the second ground of attack is fatal. The order was not made by the magistrate who heard the evidence, but by Mr. Harris who for this purpose is no better than a stranger. In short, the order, which is the sole justification for the appellants remaining in custody, was made coram non judice.

It was sought to establish that the entry in the magistrate's case book, signed by Mr. Perez, was the equivalent of an order under s. 10 of the Extradition Act, 1870, and justified the detention of the appellants. The foundation of this contention was the Summary Conviction Offences (Procedure) Ordinance, of which ss. 11 and 12 (Revised Laws of Trinidad and Tobago, 1925, c. 24) run thus:—

"11. Every magistrate and justice shall keep or cause to be kept, a record of all complaints brought in his district, distinguishing the nature thereof, and the mode in which, and the name or names of the magistrate or justice by whom, the same shall have been disposed of.

"12. Such record when signed by the magistrate or justice as aforesaid shall be conclusive evidence of the several matters and things therein set forth and contained."

These sections cannot, in their Lordships' opinion, cure the invalidity of the order of November 6, 1930. They operate to establish the fact that the decision of Mr. Perez was to make what is termed in the case book an "extradition order"; but the fact remains that no order was made or is in existence except the one made by Mr. Harris, which, as has been pointed out, is invalid.

Finally, authorities were cited with a view to establishing that if a Court is satisfied that good reason exists why persons in custody should remain in custody, the Court will not order their release in consequence of some mere irregularity or defect in procedure.

The cases upon which reliance was placed were *Ex parte Servini* (1); *Ex parte Krans* (2); and *Rex* v. *Marks*. (3) The two last-named cases have nothing to do with extradition. They are instances in which the Court has refused to be deterred by some technical irregularity from exercising its jurisdiction over persons normally subject to that jurisdiction. They do not assist their Lordships in the consideration of the present case. *Ex parte Servini* (1) was an extradition case, and was cited by the Supreme Court in support of its decision. It is, however, very far removed in its facts from the facts affecting the appellants here. There was no omission in that case to prove a fact personal to the individual, which was essential to the establishment of jurisdiction over him. What was omitted was merely formal proof of the existence of an Order in Council as to the making of which no possible doubt could exist.

Their Lordships fully realize that the appellants, as convicted criminals, have no claim to benevolent consideration, but the only jurisdiction which exists in Trinidad in relation to them is founded upon the Extradition Acts and the treaty, and that jurisdiction can arise and be exercised against them only if the requirements of those documents are fulfilled. The French authorities have failed to furnish proof of the existence of one requirement under the treaty—namely, that the crimes were committed in French territory, and the legal authorities in Trinidad have failed to bring into existence one requirement under the Acts—namely, a valid order justifying the detention of the appellants in custody.

It follows, therefore, that the Supreme Court should be directed to discharge the appellants, and their Lordships have humbly advised His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondent: *Burchells.*

(1) [1914] 1 K. B. 77. (2) 1 B. & C. 258. (3) 3 East 157.

[PRIVY COUNCIL.]

J. C.*
1931
Oct. 22.

CORPORATION OF THE CITY OF TORONTO . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Legislative Power—"Royalties"—Fines for Criminal Offences—Dominion Act diverting Fines from Provincial Treasury—Criminal Law—Criminal Code of Canada, s. 1036, *sub-s.* 1—*British North America Act,* 1867 (30 *&* 31 *Vict.* c. 3), *s.* 91, *head* 27; *s.* 109.

Assuming, without deciding, that the term "royalties" in s. 109 of the British North America Act, 1867, includes fines imposed for infractions of the criminal law, any right conferred by s. 109 on the Province of Ontario to claim fines as "royalties" extends only to such fines as have not been otherwise appropriated by competent authority, and the Parliament of Canada, having by s. 91, head 27, exclusive authority as to the criminal law, is competent to direct that fines shall be otherwise appropriated, and in what manner. That Parliament therefore had power to enact the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada directing that in the Province of Ontario fines are to be paid over to a municipal or local authority bearing, in whole or in part, the expense of administering the law under which the fine was imposed.

Bradlaugh v. *Clarke* (1883) 8 App. Cas. 354, 358, 368 applied.

Judgment of the Appellate Division, 65 Ont. L. R. 320, reversed.

APPEAL (No. 54 of 1931) from a judgment of the Supreme Court of Ontario (Appellate Division) delivered on March 28, 1930, reversing a judgment of Rose J.

The appellant City by a petition of right claimed that under the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada, the City and not the Crown in the right of the Province should have paid over to it a fine of $60,000, which had been imposed upon certain persons convicted at the Toronto assizes of conspiring to defraud the Government of the Province. The Attorney-General for the Province by a statement of defence pleaded that the proviso above referred

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

J. C.
1931
Toronto City Corporation v. The King.

to was ultra vires, and that the fine became the property of His Majesty in the right of the Province under s. 109 of the British North America Act, 1867.

The material facts, and the statutory provisions above mentioned, appear from the judgment of the Judicial Committee.

The trial judge, Rose J., dismissed the petition upon the grounds pleaded.

An appeal to the Appellate Division was allowed by a majority (Riddell, Masten, and Fisher JJ.A.; Latchford C.J. and Orde J.A. dissenting). The grounds of the judgments appear from a report at 65 Ont. L. R. 320.

1931. July 23, 24. *Geary K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant City. By s. 109 of the British North America Act, 1867, "royalties" which then belonged to the former Provinces were vested in the Provinces then created. Having regard to the judgment of the Board in *Rex* v. *Att.-Gen. of British Columbia* (1) it is conceded that "royalties" may so vest although they arise after the Act. Even if fines came within the expression "royalties" as part of the jura regalia, that is only the case so far as they have not been otherwise appropriated by law: *Bradlaugh* v. *Clarke.* (2) The exclusive power of the Parliament of Canada under s. 91, head 27, extends to the criminal law in its widest sense: *Att.-Gen. for Ontario* v. *Hamilton Street Ry. Co.* (3) Under that head the Dominion legislature had power to direct to whom fines should be paid, and consequently to enact the proviso to s. 1036, sub-s. 1, of the Criminal Code. The power applied not only to fines arising under provisions of the Criminal Code enacted by the Dominion, but also to fines under common law offences. The power was not affected by the Provincial powers under s. 92: *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (4); *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada.* (5)

(1) [1924] A. C. 213.
(2) 8 App. Cas. 354.
(3) [1903] A. C. 524.
(4) [1924] A. C. 222.
(5) [1928] A. C. 475, 486.

Tilley K.C. and *E. Bayly K.C.* (with them *A. T. Denning*) for the Attorney-General for Ontario. Before the Act of 1867 fines of the nature now in question were paid to the old Provinces under the Statutes of United Canada, 1859, c. 118. They represented part of the prerogative revenue of the Crown and were within the word "royalties": Blackstone, Bk. 1, ch. 8 (passim), *Amerciaments and Fines* (1); *Bradlaugh* v. *Clarke.* (2) By s. 109 they were vested in and appropriated to the respective new Provinces and became part of their property and assets. Although s. 1036, sub-s. 1 (*a*) and (*b*), may be valid, the proviso was invalid. It was not in substance an enactment as to the criminal law within s. 91, head 27. Further, the Dominion powers under s. 91 do not enable it to affect property assigned to the Provinces: *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario* (3); *City of Montreal* v. *Montreal Harbour Commissioners* (4); *Reference re Waters and Watercourses.* (5) The proviso dealt with a matter which was local, and affected one Province only; further, it interfered with municipal institutions in the Province (s. 92, head 8), and the administration of justice in the Province (s. 92, head 14). The cost incurred in the Province in enforcing the law is dealt with by Provincial enactments. Under s. 12 of the Act of 1867 the Governor General in Council may remit a fine, but that is the only power under the Act to deal with a fine once it is imposed.

Plaxton K.C. for the Attorney-General for Canada, intervener.

Lanctot K.C. and *Maurice Alexander* for the Attorney-General for Quebec, intervener.

Oct. 22. The judgment of their Lordships was delivered by

LORD MACMILLAN. On October 24, 1924, at a sitting of the High Court Division of the Supreme Court of Ontario held at the city of Toronto, one Aemilius Jarvis, after trial before the Chief Justice of the Common Pleas and a jury, was found guilty of conspiring to defraud the Government

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(1) (1704) 3 Salk. 32.
(2) 8 App. Cas. 354.
(3) [1898] A. C. 700.
(4) [1926] A. C. 299.
(5) [1929] S. C. R. 200.

J. C.
1931
Toronto City Corporation v. The King.

of the Province of Ontario and was sentenced to be imprisoned for six months and to pay a fine (as reduced on appeal) of $60,000. The fine was paid to the senior registrar of the Supreme Court of Ontario on April 22, 1925. Thereupon, the present appellant, the Corporation of Toronto, founding on the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada, claimed that the fine should be paid over to it. That section enacts that " whenever no other provision is made by any law of Canada for the application of any fine . . . . imposed for the violation of any law . . . . the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed," with certain specified exceptions, after which follows this proviso: " Provided, however, that with respect to the Province of Ontario the fines . . . . first mentioned in this section, shall be paid over to the municipal or local authority, where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed."

It was admitted that the expense of administering the law under which the fine of $60,000 in question was imposed was in part borne by the appellant corporation.

The senior registrar did not give effect to the claim of the appellant and paid over the fine to the Attorney-General for the Province of Ontario. The latter in turn forwarded it to the Provincial treasurer who retained it as part of the funds of the Province.

The appellant corporation then presented a petition of right in the Supreme Court of Ontario claiming (1.) a declaration that it was entitled to payment of the fine, and (2.) an order for payment thereof. In the statement of defence lodged, on behalf of the respondent, the Attorney-General for the Province submitted (1.) that the proviso above quoted to s. 1036 of the Criminal Code of Canada was ultra vires of the Parliament of Canada, and (2.) that the fine in question when paid to the registrar became the property of His Majesty in right of the Province of Ontario under s. 109 of the British North America Act. That section is in the following terms:

J. C.
1931
TORONTO CITY CORPORATION
v.
THE KING.

"All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same."

The trial judge (Rose J.) found the appellant corporation entitled to the relief sought, but on appeal, the Appellate Division, by a majority of three to two (Riddell, Masten and Fisher JJ.A.; Latchford C.J. and Orde J.A. dissenting) reversed the decision of the trial judge. Hence the present appeal. The Attorney-General of Canada was granted special leave to intervene and has lodged a case in which he maintains the legislative authority of the Parliament of Canada to enact the provisions of s. 1036 of the Criminal Code of Canada and in particular the proviso now challenged. The Attorney-General for Quebec intervenes in support of the contentions for the Province of Ontario.

The controversy which has thus in the aggregate equally divided judicial opinion in Ontario, presents a clear-cut issue. On the one hand the appellant corporation, supported by the Attorney-General for the Dominion, maintains that the legislation impugned was within the competence of the Dominion Parliament under s. 91 of the British North America Act whereby the exclusive legislative authority of the Parliament of Canada is declared to extend to: "27. The criminal law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." On the other hand it is maintained on behalf of the Province that fines imposed for offences against the criminal law are "royalties" within the meaning of s. 109 of the British North America Act above quoted, that the right to all such fines belonged to the Province of Canada at the Union and consequently that all such fines arising in the Province of Ontario have since the Union belonged and now belong to the Province; it was therefore ultra vires of the Dominion

Parliament to enact legislation depriving the Province of a right which the British North America Act conferred upon it, and the Provincial legislature alone was entitled to legislate as to the destination of fines imposed in the Province, for such fines come under head 13 of s. 92 of the Act as "property and civil rights in the Province."

The term "royalties" as used in s. 109 of the British North America Act, 1867, has more than once been the subject of interpretation by this Board. In *Attorney-General of Ontario* v. *Mercer* (1), it was held to include escheats; and in *Rex* v. *Attorney-General of British Columbia* (2) it was held to include bona vacantia. As was pointed out in the latter case (3), their Lordships have refrained from attempting any comprehensive definition of the content of the term, preferring to deal with each case as it arises. They are now called upon to consider the case of fines inflicted for breaches of the criminal law.

That the Sovereign has a prerogative right to receive fines imposed on convicted persons may be accepted as a general principle, but it is not an absolute or unqualified right. Historically it is no doubt associated with the conception of the administration of justice by the King as at once a duty and privilege and a valuable source of profit. "The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statute for the public good and is interested jure publico in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary": per Selborne L.C. in *Bradlaugh* v. *Clarke*. (4) The law is "that every unappropriated penalty goes to the King." (5) While the right to receive fines imposed for criminal offences may thus with sufficient accuracy be described as a jus regale or royalty, it is a right of a special kind. The legal characteristics of the jura regalia vary. Some are incommunicable to a subject; others may be granted to or acquired by subjects. Some are absolute; others are qualified. In the case of fines, it is only those which are "unappropriated" which belong to the Crown, i.e., those the disposition of which has not been by competent authority otherwise directed. The criminal law provides many instances in which fines imposed for particular crimes or offences are directed to be paid over to named persons or institutions, for example, to a common informer. The motive may be either the encouragement of the detection and prosecution of crime or the recognition of the special claim of a particular institution or object to the benefit of this source of revenue. In so far as the legislature directs the special application of fines the prerogative right to fines is abrogated. It is only where, as Lord Selborne says in the passage above quoted, "no provision is made to the contrary" that fines belong de jure to the Crown.

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(1) (1883) 8 App. Cas. 767.

(2) [1924] A. C. 213.

(3) [1924] A. C. 221.

(4) 8 App. Cas. 354, 358.

(5) 8 App. Cas. 368.

Turning now to s. 91 of the British North America Act, their Lordships find that "notwithstanding anything in this Act," and therefore notwithstanding the provisions of s. 109, "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within . . . . the criminal law." Plainly, and indeed admittedly, this confers on the Dominion Parliament the exclusive right by legislation to create and define crimes and to impose penalties for their commission. In their Lordships' opinion it no less empowers the Dominion legislature to direct how penalties for infraction of the criminal law shall be applied. It has always been regarded as within the scope of criminal legislation to make provision for the disposal of penalties inflicted, as innumerable instances show, and the power to do so is, if not essential, at least incidental, to the power to legislate on criminal matters for it may well go to the efficacy of such legislation. If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation might seriously affected, if not stultified.

Assuming then, though without deciding, that the term "royalties" as used in s. 109 of the British North America

Act, 1867, is apt to include fines imposed for infraction of the criminal law, their Lordships reach the conclusion that any right conferred by that section on the province of Ontario to claim fines as "royalties" extends only to such fines as have not been otherwise appropriated by competent authority and that the Dominion Parliament is an authority competent to direct that, and how, such fines may be otherwise appropriated.

Holding this view their Lordships find it unnecessary to enter at any length upon the question whether the particular crime of which Jarvis was convicted and for which he was fined was or was not a recognized crime at the union, or whether it was a common law crime or a statutory crime. They note that the indictment on which he was charged embraced seven heads of which four appear to be common law charges and three to be charges of contravening the Criminal Code. The charge upon which he was actually convicted and fined appears to have been the charge of conspiracy to defraud, which is expressly created and defined by s. 444 of the Criminal Code, while the fine imposed was authorized by the combined effect of that section and s. 1035, sub-s. 2. The particular case in hand would therefore seem to be one in which the fine was imposed under the Criminal Code for a crime committed against that Code, and as to which therefore there might well be room for argument that the right to such a fine did not belong to the Province of Canada at the union. Their Lordships, however, do not proceed upon this ground, but on the general principle that any prerogative right to fines which as a "royalty" passed from the Province of Canada to the Province of Ontario at the union was a right only to such fines as might not be otherwise appropriated by the Dominion Parliament in the exercise of its exclusive right to legislate on all matters coming within the criminal law. They therefore hold that the impugned proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada was not ultra vires of the Parliament of Canada.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Appellate Division reversed and the judgment of the trial judge restored.

J. C.
1931
TORONTO CITY CORPORATION v. THE KING.

The appellate Corporation will have its costs here and below.

Solicitors for appellants: *Freshfields, Leese & Munns.*
Solicitors for respondent: *Blake & Redden.*
Solicitors for intervener: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1931
Nov. 19.

LADY DAVIS AND ANOTHER . . . . APPELLANTS;

AND

LORD SHAUGHNESSY AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada—Quebec—Right of Appeal to Privy Council—Rights in Future—Duty of Court to decide whether Case is appealable—Code of Civil Procedure (Quebec), art. 68.

In art. 68 of the Code of Civil Procedure of Quebec, which provides that an appeal lies to the Privy Council from final judgments rendered in appeal by the Court of King's Bench in cases, among others, "concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected," the "other matters" are not necessarily ejusdem generis with the matters previously mentioned.

Upon an application to admit an appeal it is the duty of the Court to decide whether there is a right of appeal under the statutory provisions applicable.

The headnote to *E. W. Gillett & Co.* v. *Lumsden* [1905] A. C. 601, which case arose under R. S. Ont., 1897, c. 48, s. 1 (now R. S. Ont., 1927, c. 86, s. 1), is wrong so far as it states that an appeal is incompetent if the Court has left open the question whether the case is appealable; the Judicial Committee held that the appeal was incompetent, not because that question had been left open, but because the case was not within the provisions of the section.

PETITION by the respondents to set aside an order of a judge of the Court of King's Bench for the Province of Quebec admitting an appeal to His Majesty in Council from a judgment of the Appeal Side of that Court, delivered on July 27, 1931, and for the consequent dismissal of the appeal.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD THANKERTON, LORD SALVESEN, and SIR JOHN WALLIS.

The provisions of art. 68 of the Code of Civil Procedure for Quebec, governing the right of appeal, and the nature of the present case appear from the judgment of the Judicial Committee.

The will under which the respondents were executors and trustees provided for the payment of salaries of $5000 per annum to each; the sums which the appellants alleged that the respondents had improperly voted to themselves as salaries, and which in the aggregate exceeded $12,000, were increases in remuneration which they received for their services as directors, and otherwise, of a company in which the deceased has vested his assets, and another company subsidiary to it.

1930. Oct. 30. *Hon. Geoffrey Lawrence K.C.* (with him *A. R. Holden*) for the respondents (petitioners). The only clauses of art. 68 of the Code of Civil Procedure under which there could possibly be a right of appeal are clauses 2 and 3. With regard to clause 2, the words " rights in future " should be read ejusdem generis with the words which precede. That view was laid down by the Supreme Court of Canada in *O'Dell* v. *Gregory* (1), and has since been followed in the Quebec Court. Nor does the case come within clause 3. The thing demanded was the removal of the trustees; there was no claim for repayment to the companies of the sums which it was alleged the respondents had improperly voted themselves, or to recover money. The appellants do not appear to have suggested in their application that clause 3 applied. The learned judge gave no decision whether the case was appealable or not.

[VISCOUNT DUNEDIN. On that point the headnote to *E. W. Gillett & Co.* v. *Lumsden* (2) seems to support the petitioners, but it does not accurately represent the judgment of the Board so far as it says that the appeal was incompetent because the question had been left open.]

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(1) (1895) 24 Can. S. C. R. 661.

(2) [1905] A. C. 601.

The Ontario statute which applied in that case provided that, except in the cases specified, "no appeal shall lie." Owing to the different terms of art. 68 the Court in Quebec has considered that it was not necessary to decide whether there was a right of appeal.

[VISCOUNT DUNEDIN. I think that it is an undesirable practice for the Court in Quebec not to express an opinion whether the appeal is competent under the Code.]

Pritt K.C. and *Horace Douglas*, for the appellants, were not called upon.

Their Lordships stated that they would humbly advise that the appeal be dismissed; the reasons would be delivered later.

Nov. 19. The reasons of their Lordships were delivered by

VISCOUNT DUNEDIN. The first of these petitions is one to quash leave to appeal to His Majesty in Council given by a judge of the Court of King's Bench for Quebec against a judgment of the Court of King's Bench (Appeal Side), and thereafter to dismiss the appeal. The petition is opposed, and the appellants, in case they are unsuccessful in their opposition, at the same time present a petition to His Majesty in Council for special leave to appeal.

Now, the article of the Code of Civil Procedure of Quebec which deals with the right of appeal to His Majesty in Council is art. 68, in the following terms :—

"68. An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench: 1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty; 2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected; 3. In every other case where the amount or value of the thing demanded exceeds twelve thousand dollars."

The action in which the appellants wish to appeal is an action by beneficiaries under a will for the removal of the respondents, who are trustees, alleging maladministration and, in particular, averring that they voted to themselves as salary sums of money which they had no right to do, and paid a large sum to another person. The action was decided against the appellants by the trial judge and by the Appellate Court.

The judgment of the judge of the Court of King's Bench granting leave to appeal was in the following terms: "Considering that the appellants submit that, under and by virtue of para. 2 of art. 68 of the Code of Civil Procedure, they have the right of appeal de plano from the judgment of which they now complain inasmuch as it concerns matters in which their rights in future may be affected, within the meaning of the said paragraph, adding that, although they by their petition in terms pray that it be allowed by this Court, that prayer is due purely and simply to the fact that they have followed the practice in that regard and adopted the customary form ;

Considering in view of the position taken by this Court in *Levack* v. *Samson* (1) ' future rights ' may be involved in the judgment a quo and that in the circumstances it is right and proper to leave it to His Majesty in His Privy Council to decide as to His jurisdiction in the matter ;

Considering that the want of certainty as to how His Majesty in His Privy Council may construe and apply said art. 68, para. 2, Code of Civil Procedure, is sufficient to show that the present appeal is not invalid on its face, since it is quite possible that their Lordships of the Privy Council may decided to entertain it ;

Considering that in the case of *Ryan* v. *Cunningham* (2), now pending before the Privy Council, in which it was urged as a ground of appeal that ' future rights ' of the parties were necessarily involved in an action to annul a marriage, this Court received and granted acte of a declaration whereby an appeal from its decision was entered to His Majesty in His Privy Council ;

(1) (1925) Q. R. 41 K. B. 134.
(2) Appeal admitted October, 1930; no further proceedings.

J. C.
1931
DAVIS
v.
SHAUGHNESSY.

Considering that the appellants are satisfied that they have done all that is required to be done by them in order duly to enter their said appeal to His Majesty in His Privy Council by depositing in the office of this Court an inscription or notice of appeal and the required security, and that in the circumstances acte should be given them of having made that deposit;

Wherefore, I, the undersigned judge of the Court of King's Bench, without making any pronouncement or expressing any opinion as to the appellants' right to appeal, do hereby grant them acte of the deposit which they have made in the office of this Court (Appeal Side) of their petition or notice of appeal to His Majesty in His Privy Council and of the security bond in the sum of 500*l*. stg. to guarantee that they will effectually prosecute their said appeal, satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty in the event of the judgment being confirmed, costs to follow the event of the appeal to the Privy Council."

There is a reported case before this Board from the Supreme Court of Ontario which at first sight might seem to apply. It can be distinguished because the words of the Ontario statute are not identical with the statute of Quebec; but their Lordships think it best to draw attention to it because they are satisfied that the concluding sentence of the headnote in the report is wrong and because also they wish to repeat part of what was there said. The case is *E. W. Gillett & Co.* v. *Lumsden* (1), and the headnote appears: "Under the Revised Statutes of Ontario, 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent."

The action was for an injunction to restrain the defendant from infringing a trade mark and for a declaration as to the plaintiffs' right to the exclusive use of the word "cream" in connection with the manufacture of yeast. There was

(1) [1905] A. C. 601.

J. C.
1931
DAVIS
v.
SHAUGHNESSY.

also a claim for damages, but no particular sum seems to have been mentioned and none were awarded by the Court of first instance which granted the injunction. Upon appeal the Court of Appeal dismissed the action. Now, what Lord Macnaghten, who delivered the judgment, then said was that it was the duty of the Colonial Court to decide whether the appeal was competent or not and not to leave the question open, but then he went on to say (1): "In the case before their Lordships the Court of Appeal has carefully avoided expressing any opinion. If indeed the appeal had come forward by the direction of the Court, and it might fairly be inferred that they had considered the question whether it was of appealable value or not, it might be open, and probably would be open, to their Lordships to hear the appeal. But in this particular case it appears from the second paragraph of the order of the Court of Appeal of October 17, 1904, that the Court left open the question whether the appeal was competent or not, and in their Lordships' opinion the appeal is not competent."

The report has thought that the words "in their Lordships' opinion the appeal is not competent" referred to the fact of the question being left open, but their Lordships are satisfied that the reason for saying that it was not competent was that it did not fall within any provision allowing appeal, which it clearly did not, for the operative section in the Ontario statute is this: "1. Where the matter in controversy in any case exceeds the sum or value of $4000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

Their Lordships wish to repeat what Lord Macnaghten said as to its being the duty of the Court to come to a conclusion and either to allow the appeal or not. If they allow it, the result usually will not be questioned. If they do not allow it, then the wishful appellant can always present a petition for special leave to appeal, although, of course, it does not at all follow that such petition will be necessarily successful, as special leave to appeal is a matter of discretion and not of right.

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(1) [1905] A. C. 602.

Turning to the merits in this case, their Lordships are of opinion that as a matter of fact leave to appeal was rightly given, as the case seems to them to fall within both clauses 2 and 3. It falls within clause 2 because it affects the future rights of the appellants. Their Lordships do not read " other matters " as necessarily ejusdem generis with lands, tenements and annual rents, and it is obvious that the future rights of the appellants are affected since, if the judgment stands, the respondents may again vote themselves sums of money contrary to their duty as ex hypothesi they have already done. It falls within section 3 because the sums involved are far more than $12,000.

Their Lordships have therefore humbly advised His Majesty to refuse the petition to quash the appeal. This made it unnecessary to deal with the petition for special leave; but as all this was hypothetical on the merits, the costs of both petitions were ordered to be costs in the appeal.

Solicitors for respondents (petitioners): *Linklaters & Paines.*

Solicitors for appellants: *Lawrence Jones & Co.*

Considered. LABOUR RELATIONS, ETC. *v.* JOHN EAST, ETC. [1949] A. C. 134

[PRIVY COUNCIL.]

J. C.*
1931
Nov. 23.

O. MARTINEAU AND SONS, LIMITED APPELLANTS;

AND

CITY OF MONTREAL AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Legislative Power—Expropriation by City of Montreal—Assessment of Compensation—Competence of Tribunal—Finality of Award—City of Montreal Charter, art. 429*—Quebec Public Service Commission Act* (*R. S. Queb.*, 1925, *c.* 17)—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 96, 129.

Having regard to s. 129 of the British North America Act, 1867, the president or acting-president of the commission appointed under the (Quebec) Public Service Commission Act by the Lieutenant-Governor in Council, when assessing, under art. 429 of the City of Montreal Charter, the compensation to be paid for land expropriated by the city, does not act as a judge of a superior district or county court, so as to make the appointment invalid under s. 96 of the Act in that it is not by the Governor-General, and the tribunal consequently incompetent. At confederation compensation was assessed by commissioners, appointed by the Superior Court under an Act of 1864, who did not act as judges of any Court referred to in s. 96; they were a legal commission or authority within s. 129, so that the legislature of Quebec under that section, combined with s. 92, head 13, had exclusive authority to repeal the Act of 1864 and to assign the assessment of compensation to the present commission, the alteration in the mode of appointment being a matter of procedure within the legislative competence.

As by art. 429 awards made thereunder are to be final and not open to appeal, they can be questioned only for want of jurisdiction.

Fraser v. *City of Fraserville* [1917] A. C. 187 followed.

Judgment of the Court of King's Bench affirmed.

APPEAL (No. 26 of 1931) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (December 12, 1930), affirming a judgment of the Superior Court (January 2, 1930).

A quarry owned and worked by the appellants having been expropriated by the city of Montreal under the provisions

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* *Present :* LORD BLANESBURGH, LORD MERRIVALE, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

J. C.
1931
O. MARTINEAU & SONS, LD.
v.
MONTREAL CITY.

of its charter, the compensation payable was assessed under art. 429 of the charter (as amended by 15 Geo. 5, c. 92, s. 38, Quebec) by the president of the Quebec Public Service Commission, established by R. S. Queb., 1925, c. 17, as subsequently amended.

The appellants brought an action in the Superior Court of the Province to annul and set aside the expropriation proceedings on the grounds : (1.) that the Quebec Public Service Commission Act and art. 429 of the charter of the city were unconstitutional and ultra vires the Province, in that the members of the Commission were appointed by the Lieutenant-Governor in Council, whereas they exercised judicial functions, and therefore, under s. 96 of the British North America Act, 1867, could be appointed only by the Governor-General ; (2.) that the award had been made upon an improper principle, and failed to allow compensation in respect of certain of the stone.

The Attorney-General for Quebec intervened in the action, and was a respondent in the present appeal.

The trial judge (Archer J.) dismissed the action, holding that the legislation in question was intra vires, and that there was not ground for setting aside the award.

An appeal to the Court of King's Bench, Appeal Side, was dismissed by a judgment delivered by Dorion J. and concurred in by Bernier, Howard and Galipeault JJ.

1931. July 6, 7, 9, 10. *St. Germain K.C.* and *Pritt K.C.* for the appellants.

St. Pierre K.C. for the respondent city.

Lanctot K.C., *Geoffrion K.C.* and *M. Alexander* for the respondent Attorney-General.

[In addition to cases mentioned in the judgment of their Lordships, reference was made for the appellants to *Groenvelt* v. *Burwell* (1); *Winnipeg Electric Ry. Co.* v. *City of Winnipeg* (2) ; *City of Montreal* v. *Drummond* (3) ; and *Valin* v. *Langlois.* (4) The respondents relied on the British North America Act,

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(1) (1698) 1 Raym. (Ld.) 454.

(2) (1916) 30 Dom. L. R. 159.

(3) (1876) 1 App. Cas. 384, 444.

(4) (1879) 3 Can. S. C. R. 1 ; see also 5 App. Cas. 115.

1867, s. 92, head 8 (municipal institutions) and head 14 (the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, ... and including procedure in civil matters in those Courts), in addition to s. 129 and s. 92, head 13, referred to in judgment.]

Nov. 23. The judgment of their Lordships was delivered by

Lord Blanesburgh. The action out of which this appeal arises was instituted by the appellant company in the Superior Court, District of Montreal, on September 3, 1927, in order to have declared unconstitutional and inoperative, so far as they affected its own proprietary interests, certain proceedings taken by the city of Montreal for the expropriation of the appellant company and other contiguous owners from properties of theirs required by the corporation for the extension of Rosemount Boulevard from Chambord Street to Papineau Street, all within the area of the city. Thirty-two properties were scheduled for this extension. Those in the plan of expropriation numbered 21, 22 and 23 belonged to the appellant company, and it is with them that the present litigation has been concerned. They represent a strip of land 500 feet in length and 266 feet in breadth, constituting the centre of a quarry then in active operation by the company.

On June 17, 1927, the corporation, following, as it conceived, the procedure prescribed by the city's charter, presented to the Superior Court of the Province of Quebec a petition praying that the Court would fix the day for the Public Service Commission of Quebec, by its president, to proceed to inquire into and assess the compensation payable to the different expropriated proprietors, and the date also on or before which the commission should report the result of its inquiry. By an order of Court on that petition made the same day the commission was directed to commence its work by the beginning of the month of August following and to make its report by the end of the same month.

The "enquête" directed was held by the president of the commission. It commenced on August 1, 1927. The appellant company duly appeared and supported its claims for compensation both by argument and by evidence, not then taking any objection either to the regularity of the preliminary procedure, or to the competence of the commission or its president effectively to deal with the questions referred. The commission's report was made on August 22, 1927, the amount of indemnities thereby awarded in respect of the thirty-two properties amounting to an aggregate sum of $219,172.08. Of that sum the indemnities awarded to the appellant company for its properties were fixed as follows: No. 21, $2,036.30; No. 22, $114,917.90; No. 23, $1,755.60—making a total of $118,709.80.

It was explained in the report that the sum of $114,917.90 awarded in respect of the property numbered 22 included the value of lands expropriated and exploited as a quarry, and also the damages suffered in respect of that exploitation as well by the taking of the property of the appellant company No. 22 as of its properties Nos. 21 and 23.

To the report when published the appellant company took the gravest exception and this action was, as already stated, commenced on September 3, 1927, doubtless in order to forestall an application by the city to the Court to homologate the report, of which public notice had been duly given for September 6. On that application the report was homologated by a judgment of the Superior Court of that date save as to the properties of the appellant company, with reference to which no order was made by reason of the pendency of these proceedings.

The action was tried in the Superior Court of Quebec by Archer J. On January 2, 1930, he dismissed it. An appeal to the Court of King's Bench (Appeal Side) for Quebec was on December 12, 1930, likewise dismissed. The present is an appeal from the judgment of dismissal of that date.

In the Courts of Quebec the objections taken by the appellant company to the report of the commission were numerous and varied. There were objections to the regularity of the initial procedure adopted by the city: to the right of the city to expropriate the appellant company from its scheduled lands having regard to their user, extent and quality. But all other objections having in Canada been disposed of adversely to the appellants, those taken before the Board were confined to two.

The first, which may be described as the constitutional objection, was that the provisions of the charter of the city of Montreal, a Provincial statute, as well as those of the Public Service Commission Act, also a Provincial statute, in compliance with which the award was made, were unconstitutional in that they attributed to the president of the Public Service Commission, an official appointed by the Province, a judicial power and judicial functions which under the British North America Act, 1867, could be conferred only by the Governor-General of Canada.

The second objection, quite different in character, was directed to the report itself. The amount of compensation thereby awarded to the appellant company was, it was objected, so small, in view of the evidence led at the inquiry, as to constitute by itself an injustice to the appellant company amounting to actual illegality.

In view of the constitutional issue thus raised by the appellant company the Attorney-General for Quebec has been throughout a party to the proceedings, and, while taking no part in the discussion of the appellant company's second objection, he has actively contested the correctness of the company's constitutional imputations upon the validity of the report.

Notwithstanding that the case of the appellant company on what may be called the merits only arises if and when it has failed on its first and main objection to the report, it will be convenient to deal with that case at once.

It, of course, presupposes the formal validity of the award. It assumes that the president of the commission was fully empowered to make a proper award, and that the award which he has made was, except as to the inadequacy of compensation allowed, unobjectionable. But the appellant company is on that footing at once confronted with a serious preliminary difficulty, in that art. 429 of the city's charter,

J. C.
1931
O. Martineau & Sons, Ld.
v.
Montreal City.

which, as it now stands, provides for the ascertainment by the president of the Public Service Commission of the compensation to be paid to the proprietors of expropriated lands, says that there shall be no appeal from the president's decision, while, by the statute constituting the commission (17 Geo. 5, c. 16) it is provided in effect that in expropriation matters the decision of the commission even upon a question of law shall be final. It follows accordingly that the permissible interference by any Court with an award made in such an expropriation case as the present is confined within the narrowest limits, the nature of which has been laid down in judgments both of this Board and of the Supreme Court of Canada. In *Fraser* v. *City of Fraserville* (1) their Lordships, dealing with a statute which made the award of arbitrators final and without appeal, observed " that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shown that the value is not that which they were appointed to determine, are free from challenge." And the Supreme Court of Canada, in the later case of *Royal Trust Co.* v. *City of Montreal* (2), had to deal with just such an award as this, and there Davies J. observed : " The statute makes the award of the commissioners, in such cases as the present, final and without appeal. In order to give ground for attacking it, either highly improper conduct on the commissioners' part, or fraud, or the proceeding by the commissioners in making the award upon an improper principle, must be clearly shown." And the present Chief Justice of Canada in the same case observes : " There is no appeal from an award such as this. The statute expressly excludes it . . . . without entertaining an appeal an award may not be set aside solely because the Court is of opinion that it is too high or too low—even very considerably so—unless the disparity is so great that it is clear that the award must have been fraudulently made or that the arbitrators must have been influenced by improper or illegal considerations. The Court of King's Bench has held that neither of these grounds of invalidity has been established, and the clear case necessary to justify a reversal of its judgment, in my opinion, has not been made out."

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(1) [1917] A. C. 187, 194.

(2) (1918) 57 Can. S. C. R. 352, 357, 366.

In the present case no impropriety of conduct on the part of the president of the Public Service Commission is even hinted at; no suggestion is put forward that in making his report he has been influenced by improper or illegal considerations. Nor does error appear upon the face of the report. It is not possible from a perusal of it to deduce the principles on which the president acted, or to discover the method by which he reached the amount of compensation awarded. He does there refer to the fact that, as by law he was entitled to do, he had inspected the scheduled properties. It may, therefore, be reasonably inferred that his conclusions were not unaffected by what he then saw. But nothing more in this direction appears on the report, and the appellant company did not think fit at the trial to call the president to explain its findings. The company was content to rest its attack upon them merely by a reference to three separate sheets of notes or calculations in the handwriting of the president, found apparently amongst his papers produced to the Court and showing, as was suggested, with reference to the appellant company's properties, the process of reasoning by which the president arrived at the sum which by way of compensation he awarded in respect of each. Then by a comparison of these figures with the evidence led at the inquiry the appellant company sought to show such things as that in one direction the president had fixed a figure of value lower than that placed upon the property in question by some witness for the city: that in relation to another figure he had erred in law: that in relation to a third he had erred in fact, and so on.

Their Lordships do not consider themselves at liberty to follow the appellant company on this expedition of inquiry into the origins of the president's figures. They have been unable to satisfy themselves that they are entitled even to look at these notes of his, for it has not been explained how, if at all, they became evidence in the action or admissible as

J. C.
1931
O. Martineau & Sons, Ld.
v.
Montreal City.

such. It would in any case be, in their judgment, unjust to the president himself to rely upon the notes without any opportunity afforded him of explaining fully their meaning or their origin. It is perhaps, however, enough to say with reference to the use sought to be made of his notes by the appellant company, that the president, who had, as already stated, himself inspected the properties, was not bound, on a question of value, to accept the evidence of any witness, and that his views of the law are not any more than his findings of fact open as such to review.

The conclusion on this matter of the learned trial judge who very carefully investigated it was that the award could not, in respect of any of the matters complained of by the appellant company, be questioned, and the Court of King's Bench agreed with him. Their Lordships must have been well satisfied that these concurrent findings were clearly wrong before they would have ventured to advise His Majesty to displace them. But they see no sufficient reason to doubt their correctness, and in their judgment this objection to the report cannot be sustained.

But it was the constitutional objection to its validity which formed the main subject of discussion before the Board. Once again, as so often before, is the question raised whether, in reference to the administration of justice, Provincial legislation has overrun the limits of Provincial competence. The case made by the appellant company is that in the statutes to which reference will be made in a moment, the legislature of Quebec has trespassed upon the power given to the Governor-General in the matter of the appointment of judges by s. 96 of the British North America Act, 1867. A very serious question is thereby raised, for it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the judges of the superior, district and county courts in each Province is a cardinal provision of the statute. Supplemented by s. 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these judges, and also by s. 99, which provides that the judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary. A Court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by Provincial legislation.

But by s. 92, head 13, of the Act, as is well remembered, there is conferred upon the Provincial legislature the exclusive right of making laws in relation to property and civil rights in the Province and (by head 14) in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts. These exclusive Provincial powers have made it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under s. 92 of the Act, and legislation which is beyond its competence by reason of s. 96. This observation may be illustrated by two instances, neither of them remote from the present case, the first on the one side of the line and the second on the other. In *Reg.* v. *Coote* (1) it was held by this Board, in an appeal upon which, it must be noticed, the respondent was not represented, that certain statutes of Quebec appointing officers named "fire marshals," with power to examine witnesses under oath and to inquire into the cause and origin of fires and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the Provincial legislature. On the other hand, in a British Columbia case in 1890—*Burk* v. *Tunstall* (2)—it was held by Drake J. that while it was within the competence of the Province to create mining Courts and to fix their jurisdiction, it was not within its competence to appoint any officers thereof with other than ministerial powers. The learned judge, in the course of his judgment, referring to s. 96 of the Act, observes, as their Lordships think with reason: "It is true that the language used in that section is limited to the judges of the superior, district and county courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts were excluded. If this were so the Provincial legislature would only have to constitute a Court by a special name to enable them to avoid this clause. But in the section itself, after the special Courts thus named, the Courts of probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that s. 96 was intended to be general in its operation."

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(1) (1873) L. R. 4 P. C. 599.

(2) (1890) 2 B. C. R. 12.

The widespread modern legislative tendency to create what may be termed administrative tribunals to determine specific matters of controversy has undoubtedly in many cases accentuated the difficulty of defining in this matter the frontier between Provincial and Dominion territory. Nor does the difficulty arise only in Canada. In Australia also under the Commonwealth Constitution it appears in another form. This is well illustrated in the recent case before this Board of *Shell Co. of Australia* v. *Federal Commissioner of Taxation*. (1) In that case it will be found that a "Board of Appeal" to hear income tax appeals, created by the Australian Income Tax Assessment Act, 1922, had been held to be invalidly created as exercising part of the judicial power of the Commonwealth with judges appointed for a term of years and not for life, as required by ss. 71 and 72 of the constitution of Australia; while a substituted statute constituting in similar matters a "Board of Review," with modified powers, was by the decision of the Board treated as an administrative body, not exercising the judicial power of the Commonwealth, and as a result constitutional, although its members were appointed only for a term of years. The judgment of the Board (in that case delivered by the Lord Chancellor) shows the narrowness of the line of division between judicial and administrative activity.

In the present case, however, it will be found, as their Lordships think, that difficulties serious in other cases are resolved by reason of its special circumstances which are found latent in the statutory procedure regulating, at confederation, the compulsory acquisition of property by the city of Montreal. That procedure, it is suggested, as the result of bringing to bear upon it the relevant provisions of the British North America Act, thereby became and, with the modifications that have later been introduced, thenceforth remained a matter of Provincial concern alone.

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(1) [1931] A. C. 275.

In tracing the development of the procedure in question a beginning may, for present purposes, be made with the Act of the Province of Canada of 1851 (14 & 15 Vict. c. 128), consolidating the provisions of the statutes incorporating the city. By s. 68 of that Act the compensation payable on expropriation was to be fixed by the verdict of a special jury summoned, on petition of the corporation, by the justices of the peace of the city in special session. On payment or deposit by the corporation in manner prescribed of the compensation fixed by the jury the title to the expropriated property passed to the corporation. No Court apparently under the procedure of this Act had any part or lot in the matter.

The Act of 1851 was superseded by a statute of 1864 (27 & 28 Vict. c. 60), intituled an Act to amend the Acts relating to the corporation of the city of Montreal. This was the Act on the subject in force at confederation. By s. 13, sub-s. 1, the council of the city in cases of expropriation was required to apply by petition to the Superior Court, calling upon it to nominate three competent and disinterested persons to act as commissioners to fix and determine the amount to be paid in respect of any expropriated property. The Court on that petition and on being satisfied that all preliminary statutory requirements as to notice and the like had been observed, was required to appoint three such commissioners and to fix the day on which they should begin their operations and also the day on which they should make their report. By s. 13, sub-s. 7, it became the duty of the commissioners diligently to proceed to appraise the prescribed compensation. They were authorized and required to hear the parties, to examine and interrogate their witnesses and those also of the city, but to make such examination viva voce and not in writing, so that it might form no part of their report, any law, usage or custom to the contrary notwithstanding. The report of the commissioners upon its becoming final in manner prescribed in intervening sub-sections was (sub-s. 12) to be submitted by the corporation to the Superior Court or a judge thereof "for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested and consequently not open to any appeal." It will be observed in relation to this procedure that while the commissioners were appointed by the Superior Court, that Court, all formalities observed, was required, exercising no further judgment, to confirm and homologate their report, which was itself final and not open to appeal.

The first substantial modification of this procedure made after confederation is to be found in the statute of Quebec of 1899 (62 Vict. c. 59), an Act to revise and consolidate the charter of the city. Article 429 of the charter as then consolidated ran, so far as is now material, thus: "For the purpose of ascertaining the compensation to be paid to the proprietor whose building may be affected by . . . . expropriation . . . . a board of expropriation commissioners shall be appointed. . . . . Such board shall consist of one of the recorders of the city (who shall be the president and convener of the said board), two of the assessors of the city to be named by the council, and two other commissioners who shall be named by the Superior Court or a judge thereof upon a petition to that effect to be made by or on behalf of the city after continuous notice in two daily papers . . . . during a period of at least two weeks. The two latter commissioners shall be appointed upon the exclusive suggestion of the party to be expropriated. There shall be no appeal from the decision of such commissioners."

Matters so remained from 1899 to 1925. In that year was passed an Act further amending the charter of the city, and, incidentally, revising the procedure in expropriations by the substitution of a system to which constitutional objection is now taken by the appellant company.

It will not be inconvenient to set forth from the terms of the charter so confirmed so much of the new procedure as is material to the present discussion :—

" 429. The president or the acting-president of the Quebec Public Service Commission shall ascertain the compensation to be paid to the proprietor whose building or land is to be expropriated and determine, if need be, the rights of the city mentioned in the foregoing articles for the acquisition of the whole or part of the said buildings. There shall be no appeal from the decision of the president or acting-president of the Public Service Commission."

"430. . . . . The Court or judge shall fix a day on which the president or acting-president of the Quebec Public Service Commission shall proceed with his work and also the day upon which he shall make his report. . . . ."

" 434. In order to come to a decision respecting such expropriation the president or acting-president . . . . shall proceed with all due diligence to establish the value of the land and buildings to be expropriated. . . . . He shall have power to call, summon and examine witnesses under oath as well as all parties interested and to require the production of titles and documents : he shall inspect the properties to be expropriated and take all other measures which he may deem necessary to establish the fair and exact amount of the compensation to be paid for the land, buildings and servitudes to be expropriated. . . . . [His] report . . . . shall be signed and shall establish the amount for which the city shall have the right to acquire the immovables for the purpose of such expropriation."

" 438. So soon as the president . . . . has completed and signed his report in accordance with the foregoing provisions he shall deposit the same in the office of the city clerk, who shall forthwith give public notice thereof and of the day on

J. C.
1931
O. Martineau & Sons, Ld.
v.
Montreal City.

which such report will be submitted to the Superior Court or to one of the judges thereof as the case may be for confirmation or homologation. . . . ."

"439. On the day specified in the notice the city shall submit to the Superior Court or to one of the judges thereof the report . . . . for confirmation and homologation and such Court or judge as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided have been observed, shall confirm and homologate the said report, and the decision of the Court or judge shall be final as regards all interested parties and shall not be subject to appeal."

As to the Quebec Public Service Commission to whose president or acting-president the above duty is entrusted, it was created by a Provincial Act—the Quebec Public Service Commission Act of 1925, as amended by later Acts of 1926 and 1927.

The commission consists of three members appointed by the Lieutenant-Governor in Council for a term of ten years (1925, s. 4). One of the commissioners is to be appointed president of the commission and another of them vice-president (1925, s. 6). The president or the vice-president may sit alone to hear and decide any expropriation matter within the jurisdiction of the commission (1897, s. 1). The opinion of the president upon any question which, in the opinion of the commissioners is a question of law, is to prevail. There are provisions, securing the disinterestedness of every commissioner (1925, ss. 12 and 13), fixing the duties of the secretary (1925, s. 19), providing for the payment by the Government of the Province of the salaries of the commissioners and staff (1925, s. 22), and of the pension of the president (1925, s. 26), while by s. 28 (*h*), as settled by s. 6 of the Act of 1926, there is conferred upon the commission jurisdiction over a wide range of subjects, including by sub-s. 9 jurisdiction "notwithstanding any provision in the charter of such cities respectively . . . . on any question arising respecting expropriation by the city of Quebec or by the city of Montreal for any municipal purpose (including the fixing of the compensation) which under the said charters is within the jurisdiction of any board of commissioners, assessor, arbitrator or other functionary or officer, provided that every provision relating to expropriation in either of the said charters shall continue to govern expropriation by each of such cities respectively with the exception of the modification introduced by this paragraph." The decision of the commission on any question of fact within its jurisdiction is final (1925, s. 49), and by s. 58 an appeal is to lie to the Court of King's Bench (Appeal Side) from the final decision of the commission upon any question as to its jurisdiction or upon any question of law, except in expropriation matters.

This historical survey brings into prominent relief one or two facts of suggestive importance. Since 1851 no Court of the Province has ever had the right either to make or to inquire into the merits of any compensation award in expropriation proceedings originated by the city: the duty of the Superior Court to direct that the compensation be assessed and to homologate the report of its amount when made was substantially the same at confederation as it remains to-day under the later Provincial legislation now impugned; the procedure of the commissioners at confederation was not to be in strict accord with legal practice, and the only difference in substance, so far as the intervention of the Superior, or any other, Court is concerned between the procedure at confederation and the procedure now is that by the Act of 1864 the commissioners to hold the inquiry and make the compensation award were appointed by the Superior Court, whereas the president or acting-president of the Quebec Public Service Commission to whom that duty is now assigned is a Provincial officer appointed by the Lieutenant-Governor in Council. Under the Act of 1899 two only out of the members of the board of five expropriation commissioners fell to be appointed by the Superior Court, and that Act was in force and operative for twenty-six years. Neither before confederation nor since has the duty of assessing compensation been discharged by any judge of the Province, whether of a superior, district or county court. That is not one of his judicial duties. It is observable also that the validity of the Provincial legislation upon this subject since confederation has never until now been called in question. Very many titles to property must depend upon its constitutional validity It would be a serious matter indeed if that were now to be doubted.

It is accordingly with some sense of relief that their Lordships, in agreement with the Courts of Quebec, are of opinion that the assignment to the Quebec Public Service Commission of the duty of assessing compensation in expropriation proceedings by the city of Montreal was within the competence of Provincial legislation. They express no opinion —they have not directed their attention to the question— whether the statutes constituting the commission are in relation to other matters within the Provincial field of legislation. Without going into the more general question they reach the conclusion they have expressed with reference to the matter now in hand by a consideration of the terms of s. 129 of the British North America Act, 1867.

That section, it will be recalled, is in the following terms : " Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless . . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act."

In their Lordships' judgment the commissioners whose appointment was authorized by the Act of 1864 in force at confederation were " legal commissioners " or " authorities " within the meaning of that section, dealing with property and civil rights in the Province of Quebec within the meaning of s. 92, sub-s. 13, of the statute, so that the repeal of the Act of 1864 constituting these commissioners with the alteration of the procedure in expropriation, as it has now been altered,

J. C.
1931
O. MARTINEAU & SONS, LD.
v.
MONTREAL CITY.

is as a result of s. 129 and by reference to the other provisions of the statute within the sphere of Provincial legislation exclusively.

The commissioners at confederation were not judges either of superior, district or county courts of the Province. The jurisdiction to award compensation was not vested in any of these judges. The fact that the commissioners were appointed by the Superior Court was a procedure provision the continuance or alteration of which became, under the British North America Act, a question of Provincial concern. To their Lordships it appears clear that on the true construction of that Act the Quebec Public Service Commission when now assessing compensation in expropriation cases from the city of Montreal is not acting as a judge either of a superior, district or county court, so that the appointment of its members must under the Act be made by the Governor-General of Canada.

Accordingly their Lordships are of opinion that the constitutional objection taken by the appellant company to the competence of that commission on the present occasion cannot be sustained.

For all these reasons they are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[HOUSE OF LORDS.]

H. L. (E.)*
1931
Dec. 8.

BASS, RATCLIFF AND GRETTON, LIMITED . . . . APPELLANTS;

AND

NICHOLSON AND SONS, LIMITED, AND ANOTHER . . . . RESPONDENTS.

Trade Mark—Old Mark—Registration—Distinctive Mark used before August, 1875—User as a Trade Mark—Similar Mark already on Register—Registration calculated to deceive—Honest concurrent User—Limitations on Registration—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 11, 19, 21—*Trade Marks Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *Sch. II.*

From 1865 onwards the respondents, Nicholson & Sons, brewers of Maidenhead, had stencilled an outline triangle with "N" inside on their "best pale ale" casks and had also branded "Nicholson" thereon. In 1927 they applied to register the combination as a trade mark for bitter beer. Their application was opposed by the appellants, Messrs. Bass, on account of the similarity of the outline triangle to the well known Bass solid triangle mark registered in 1876, but the Assistant Comptroller allowed the registration, limiting the outline triangle and "N" to the colours white or black. About the same time the respondents applied to remove the word "Triangle" registered by Messrs. Bass in 1926 from the register, and the Assistant Comptroller ordered the removal:—

Held, (1.) that the respondents' mark had been used both as a mark of quality and of origin before August 13, 1875, and was therefore registrable as an old mark.

In the case of a distinctive mark non-recognition by the public is immaterial on the question of "user as a trade mark."

Dictum of Lord Esher M.R. in *Richards* v. *Butcher* [1891] 2 Ch. 522, 543 disapproved.

(2.) That the respondents' mark was not prohibited from registration by s. 11 as being calculated to deceive, inasmuch as the general prohibition in that section must be read subject to the specific exception in s. 19, which impliedly authorized the Registrar to place upon the register an old mark so nearly resembling a mark of another already on the register as to be calculated to deceive.

(3.) That in view of the extensive user of the appellants' mark in connection with bottled beer and the absence of any evidence that the respondents had used their mark for bottled beer, bottled beer should be excluded from the specification of goods in respect of which the respondents' mark was registered.

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* *Present*: LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

(4.) That the registration of the respondents' mark involved as a consequence the removal from the register of the appellants' mark consisting of the word "Triangle."

Decision of the Court of Appeal [1931] 2 Ch. 1 affirmed with a variation.

H. L. (E.)
1931
BASS, RATCLIFF AND GRETTON, LD.
v.
NICHOLSON & SONS, LD.

APPEAL from an order of the Court of Appeal reversing by a majority (Lawrence and Romer L.JJ.; Lord Hanworth M.R. dissenting), a judgment of Farwell J. and restoring a decision of the Assistant Comptroller acting for the Registrar of Trade Marks. (1)

The Assistant Comptroller ordered that an application by the respondents, Nicholson & Sons, Ld., for the registration of a trade mark consisting of the device of a broken triangle with the letter "N" within the triangle and the word "Nicholson" beneath it under No. 474,612 in Class 43 for bitter beer should proceed, subject to certain limitations as to colour, and directed that the Register of Trade Marks be rectified by the removal therefrom of trade mark No. 468,320 of the appellants, consisting of the word "Triangle" registered in Class 43 in respect of beer as of March 20, 1926.

The facts are stated in the report of the case before Farwell J. and the Court of Appeal, and also in the opinion of Lord Buckmaster.

1931. Oct. 20, 22, 23, 26, 27. *Wilfrid Greene K.C.* and *J. Whitehead K.C.* (with them *Robert Burrell*) for the appellants. The respondents' mark, which was used on their casks only, was never used as a trade mark before 1875. It was not used for the purpose of distinguishing the origin of their beer, but was used simply as a quality mark, and it was so recognized by their customers. To establish user as a trade mark the element of purpose is essential. See the definition of a trade mark in s. 3 of the Trade Marks Act, 1905. The appellants submit that there must be an intention, which may be inferred from the fact of user, to use the mark as indicating the origin of the goods, and such user must be accepted by the public as distinctive of the proprietor's goods. Although recognition by the public is not to be found in the statutory definition in s. 3, it is inherent in the meaning of a trade mark, and the statute merely stated the law as it was. In determining the question of user as a trade mark all the relevant facts must be regarded—the purpose for which the mark has been used, the way in which it has been brought before the public, and the way in which the public has regarded it.

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(1) [1931] 2 Ch. 1.

In *Richards* v. *Butcher* (1), where a firm of champagne growers had used the words "Monopole" and "Dry Monopole" on one side of the cases for their bottles and their name on the other side, it was held that those words had not been used as a trade mark and they were expunged from the register. Lord Esher there expressed the opinion that it must be shown that the market accepted the mark as a distinguishing mark of the proprietor's goods, and that opinion has never since been questioned. So in *In re Powell's Trade Mark* (2), affirmed by the House of Lords sub nom. *Powell* v. *Birmingham Vinegar Brewery Co.* (3), the user of the words "Yorkshire Relish" on packing cases was held not to be user as a trade mark, although in a subsequent litigation between the same parties Powell succeeded under his common law right in restraining the Birmingham Company from using those words in a manner calculated to deceive: *Birmingham Vinegar Brewery Co.* v. *Powell.* (4) In *In re McDowell's Application* (5), affirmed by the House of Lords sub nom. *McDowell* v. *Standard Oil Co.* (6), Sargant L.J. was of opinion that the use of the word "Nuvol" on barrels was not user as a trade mark. Assuming user of the respondents' mark as a trade mark, having regard to Bass's well-known triangle mark for bitter beer, the respondents' mark is calculated to deceive, and more particularly in that it may lead to their beer being known as triangle beer: *In re Worthington & Co.'s Trade Mark* (7); *In re Trade Mark of La Société Anonyme des Verreries de l'Etoile* (8), and it cannot be admitted to registration consistently with s. 11 of the Act of 1905. It may be objected that under the exception to s. 19 the Registrar is impliedly authorized in the case of old marks to register a mark identical with the registered trade mark of another or so nearly resembling it as to be calculated to deceive. But the two sections have different functions. Sect. 11 is a section of general application and deals with the interests of the public, and it is under that section that the evidence of user comes in. Sect. 19 is concerned with a contest between two traders, and is dealing with the physical aspect of the marks as they appear on the register. The exception in that section does not preclude the previous owner from making a case on his common law rights; it merely says that his statutory monopoly shall not be a bar to registration. In this way the two sections can be reconciled. The interests of the public remain, notwithstanding the exception in s. 19, and it does not follow that because the respondents get out of s. 19 they get out of s. 11 as well. Further, the respondents' mark is a device, and is therefore not a mark coming within the definition of marks in use before August 13, 1875, contained in the proviso to s. 9 and referred to in s. 19. Assuming that the respondents' mark is qualified for registration, the limitations imposed by the Assistant Comptroller are insufficient to prevent confusion, and registration, if permitted at all, should be limited to the manner in which the mark was used before 1875—i.e., to user on the casks. But the real business danger arises in the case of bottled beer. There never has been any user by the respondents of their mark in connection with bottled beer, for which they have a different trade mark, and the appellants would be content to accept a limitation, in addition to the limitation as to colour already imposed by the Assistant Comptroller, restricting the goods for which the mark is to be registered to bitter beer "excluding bottled beer." Even if registration of the respondents' mark be permitted, there is no valid ground for the removal of the appellants' trade mark "Triangle" from the register.

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(1) [1891] 2 Ch. 522, 532, 537, 538, 543, 549.

(2) [1893] 2 Ch. 388, 394, 397, 403.

(3) [1894] A. C. 8.

(4) [1897] A. C. 710.

(5) (1926) 43 R. P. C. 313.

(6) [1927] A. C. 632.

(7) (1880) 14 Ch. D. 8.

(8) (1893) 10 R. P. C. 436; (C. A.) [1894] 2 Ch. 26.

[They also referred to *In re Maeder's Application* (1) and *In re Lehmann's Application* (2) (cases of honest concurrent user under s. 21).]

Trevor Watson K.C. and *Kenneth Swan* for the respondents (called on only on the question whether any further limitation should be imposed upon the registration). The question of the proposed limitation was argued before the Assistant Comptroller, but he did not see fit to interpose, and it has been held in this House that his discretion should not be interfered with unless it is clearly wrong: *Banham (George) & Co.* v. *Reddaway & Co.* (3) Moreover, his discretion has been affirmed by two members of the Court of Appeal. The Comptroller has said that if the registration is allowed with the limitation imposed by him there is no reasonable risk of confusion. The power of limitation has been very sparingly used except in the case of marks for export use only, and the reason is that, although it may do no immediate harm, in the constant changing conditions of trade it may do irreparable harm in the future. There being no deceptive similarity, the only question is as to deception which may arise from use, and the test is: Is there such a degree of deception as would disentitle the mark to registration in a court of justice? The registration of a trade mark does not give the registered owner any right to use the trade mark if that use is calculated to deceive, and if in the future the putting on by the respondents of a triangle on their bottled beer leads to deception, Bass will have a right to restrain them by a common law action: *In re Lyle and Kinahan's Application.* (4) There is here no substantial probability of deception. Visual similarity being out of the question, the only other modes in which deception can arise are by written order and by verbal order. As to written orders, whenever the word "triangle" is used for Bass's beer it is invariably qualified by some colour or by specifying the name of the firm. As to verbal orders, the evidence is that any ordering by the simple use of the word "triangle" is highly exceptional and, in the words of Lord Haldane,

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(1) [1916] 1 Ch. 304; 33 R. P. C. 77.
(2) (1918) 35 R. P. C. 92.
(3) [1927] A. C. 406, 413.
(4) (1907) 24 R. P. C. 249, 262.

"this looseness of practice ought not . . . . to be regarded as imposing any duty on either the respondents or the Registrar of Trade Marks": *Boord & Son* v. *Bagots, Hutton & Co.* (1)

The House took time for consideration.

1931. Dec. 8. Lord Buckmaster. My Lords, the appellants upon this appeal are Bass, Ratcliff & Gretton, the well known brewers. The chief respondents are Nicholson & Sons, who are also brewers carrying on business at Maidenhead. The other respondent is the Registrar of Trade Marks.

On November 5, 1926, Messrs. Nicholson & Sons applied for registration of a trade mark for bitter beer, consisting of a skeleton triangle broken at the three angles with the letter "N" in the middle, and on August 14, 1929, the Assistant Comptroller decided to register the said mark with the name Nicholson underneath, and the provision that the part of the mark consisting of the triangle and the letter "N" should be limited to the colour white or the colour black. On March 20, 1926, the appellants registered a trade mark consisting of the word "Triangle" registered in Class 43 in respect of beer.

The present dispute arises out of: (1.) the opposition by the appellants to the respondents' application to register the mark above mentioned, and (2.) an application by the respondents to expunge that of the appellants. The Registrar refused the appellants' application and granted that of the respondents. Farwell J. reversed this decision in both respects, and the Court of Appeal in turn reversed the judgment of Farwell J., with the dissent of the Master of the Rolls.

The question as to the appellants' trade mark can be better considered after deciding the merits of their opposition. The grounds upon which this is based are: (1.) that the respondents' mark is calculated to deceive, and (2.) that it had not been used by the respondents or their predecessors as a trade mark prior to August 13, 1875. The material facts, apart from the question of how those facts affect the minds of different people, are fortunately not in dispute.

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(1) [1916] 2 A. C. 382, 394.

The appellants have been in business for over a century and a-half and, in 1855, the device of the solid red triangle in the middle of a lozenge with "Bass & Co.'s Pale Ale" above it and "Bass & Co." below was adopted by them as a trade mark for their pale ale. It is unnecessary to describe this mark in detail. It is well known to every one, and it is probably, as the appellants assert, one of the best known trade marks in the world. In 1876 the said device was registered for pale ale and in 1883 for beer. The solid block triangle was also registered alone for pale ale in 1876 and for beer in 1883. At that date there was no limitation as to colour to be used in a registered device, and it was in substance this consideration that caused the Court of Appeal to reject in 1880 Messrs. Worthington's application to register as a trade mark a church framed in a triangle. (1) The appellants, in addition to the well known red colour, have used a purple triangle for export beer, a blue triangle for beer destined for racecourses, and a red, blue or white triangle to denote the particular brewery at which the beer had been brewed. Beer has been constantly ordered from them by reference to the triangle and, in certain districts in the North, the beer itself is often referred to by customers at the bar in terms of affection as "t'owd triangle." The extensive character of their sales under this mark has never been disputed, and the label with the red triangle in the centre upon bottled beer is one of the most familiar of all devices in every bar and public house.

The business of the respondents has also a long history. Their brewery was established in Maidenhead about 1840, and has been continuously carried on from that time onwards. Amongst the beer brewed by them was a bitter beer of superior quality which has been sold exclusively in casks and never in bottles. This beer up to 1865 was distinguished on the casks by a triangle chalked on the cask's head by the cellarman, the cask itself having branded upon it the name

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(1) *In re Worthington & Co.'s Trade Mark*, 14 Ch. D. 8.

"Nicholson." In 1865 the respondents caused a stencil to be cut of this triangle and, as by the necessity of the case, the triangle could not be continuous, each triangle had what was called a flying diamond at each end, the sides of the triangle being broken just at the angle. This stencil also had a large capital letter "N" in the middle, and from that time onwards the beer was sold with this mark stencilled on the casks and the word "Nicholson" branded underneath.

The business in the earlier days was largely done with private customers, though it was also well established with the local public houses which were then free to buy their beer where they pleased, Messrs. Nicholson owning no tied houses before 1886. Casks so marked have been exhibited at exhibitions, and this mark was well known to all the people who dealt with Messrs. Nicholson and, in the Maidenhead district, was also known to many of the customers of the public houses, owing probably to the fact that in some of these houses the casks of the beer were placed behind the bar and not in the cellar.

The first point to be considered is whether in these circumstances such a mark was a trade mark within the meaning of the Trade Marks Act of 1905. That it was a mark is beyond dispute, but it is said it was nothing but a quality mark, similar to the marks X, double X and triple X, which are familiar as describing qualities of beer. Whether it should be regarded as a trade mark or no depends upon the definition of the statute. This, by s. 3, declares that :—

"3. In and for the purposes of this Act (unless the context otherwise requires) :—

> A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof :
>
> A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale :"

Upon this definition two points are urged. The first that this mark is a quality mark which does not indicate that the

H. L. (E.)
1931
BASS, RATCLIFF AND GRETTON, LD. v. NICHOLSON & SONS, LD.
Lord Buckmaster.

goods to which it relates are the goods of the proprietor of the mark, and secondly that, even if it were otherwise, the mark was not used for the purpose of indicating the proprietorship of the owners of the mark. In applying this definition to any particular case, it must necessarily be considered in relation to the class of trade in which the article is used. Unless it can be said that cask beer dealt with in the manner described cannot obtain a trade mark because the fact that the casks are constantly in the cellars of the publicans and private customers prevents the public at large seeing the mark, this mark seems to me to have satisfied all the necessary conditions.

That the mark itself is not merely a quality mark appears to me clear. It was a mark exclusively used by Nicholson to denote a special quality, not of beer generally, but of beer exclusively brewed by them, and it was so known in the trade, to take an experienced witness, Mr. Davies, a joint director of the well known company of restaurant proprietors, Pimms Ld. He says: "I should always recognize a cask of Nicholson's ale by the white triangle and the letter 'N.'" Indeed the large "N" in the middle of the triangle and the word "Nicholson" underneath appear to me to be the clearest possible indication that the goods were the goods of Messrs. Nicholson, who were indisputably the proprietors of the mark. At one time in the course of the case it was indeed suggested that the letter "N" was in the form of a device, but the argument barely merits discussion; the letter is a plain capital letter and can only refer to Nicholsons, whose names were branded underneath on every cask. It is true that the branding grows dull with time, but that does not prevent it from being capable of being deciphered and, regarding it as a whole, I find it impossible to avoid the conclusion that this mark satisfied all the conditions of the definition. In this respect I differ from Farwell J., who thought that the impression the mark would make on people would be that of the quality mark alone.

It is, however, further urged by the appellants that something more than a purpose in the use of the mark was required to establish it as a trade mark and that ordinarily its acceptance by the public was also necessary, and this view was adopted by Farwell J. The passage of Lord Esher's judgment in *Richards* v. *Butcher* (1) is relied on in support of this view, but the words there used were not in the form of a definite decision. They were: "I think you must also show that the market accepted it as a distinguishing mark of your goods." I do not agree with this opinion. The definition contained in the statute contains no such condition. The purpose there mentioned may be shown independently of evidence that it was so accepted, but such evidence would naturally be of assistance in establishing the purpose.

There are two further matters that need consideration. The one is that, on the original application to register, the letter "N" was omitted from the centre of the triangle, but the learned judge who tried the case said that he had no reason to doubt that that was a mistake on the part of the solicitors. The word "Nicholson" was also omitted and introduced by the Registrar, who held, and as I think quite rightly, that in the circumstances it was part of the mark. I attach no importance myself to this omission. I think Mr. Nicholson was right when he said that he did not know how much of his mark would be regarded as a trade mark, nor do I think it matters. The use of this word must have been for the purpose of describing proprietorship, and its invariable association with the rest of the mark is sufficient to enable the whole thing to be treated as one.

The other fact is that, in a long correspondence which took place for the purpose of settling the dispute as to the use of this device, Messrs. Nicholson were ready to regard it as a quality mark, but, on the other hand, the appellants took the opposite view, for they represented that in future the mark should only be used as an indication of quality. I do not think that the correspondence helps much in the matter. It only leaves the impression of regret that parties who were so near agreement failed to reach it. I am therefore of opinion that this mark was used as a trade mark before 1875, and that leads to the consideration of the rights that are so conferred upon Messrs. Nicholson.

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(1) [1891] 2 Ch. 522, 543.

Clause 19 of the Trade Marks Act is in the following terms :—

> "*Identical Trade Marks.*
>
> 19. Except by order of the Court or in the case of trade marks in use before the thirteenth day of August one thousand eight hundred and seventy-five, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive—"

and upon the words of this section and its effect much controversy has arisen. It is said in the first place that it only applies to the special provision contained in s. 9 of the Act. This section, while enumerating in five categories what are the essential particulars of a registrable trade mark, omits "special or distinctive word or words, letter, numeral or combination of letters or numerals," but by the proviso in the section it is stated that if such a mark were used as a trade mark before August 13, 1875, and continuously used as there mentioned down to the date of application for registration, it should be registrable as a trade mark. The argument upon this is that, as it is only that limited class of mark so used that can be registered under that section, and s. 19 contains no express authority to register, it applies only to that class of mark and to no other. I cannot myself so link the two sections together. The proviso in s. 9 is to enable a mark to be registered which would not otherwise be capable of registration, but s. 19 is general in its scope and there is nothing to limit the trade marks in use to which it refers to that special and limited class of trade mark that is mentioned in the proviso to s. 9. The heading of s. 19 is "Identical Trade Marks," and there is nothing to show that there is anything to restrict in this heading the definition of trade marks which the Act contains.

Sects. 20 and 21, which are alike under the same heading, clearly refer in my opinion to trade marks as defined by s. 3, and there is no reason why s. 19 should be assumed to apply only to a class of trade marks which do not comply with the special conditions which are declared to be essential in the first five paragraphs of s. 9.

The appellants' argument in this respect is, however, reinforced by the contention that s. 19 itself contains no direct authority to register, which is only to be found by relating it to the proviso in s. 9 but, where the section enacts that excepting in certain cases a trade mark shall not be registered, it clearly implies in my opinion that there is power to register in those excepted circumstances.

Finally, it is said that s. 11 contains a complete prohibition applicable to all cases. Sect. 11 is in these terms:—"11. It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design." This, it is said, is an absolute prohibition, and that unless it can be shown that this trade mark is not calculated to deceive it must be excluded. But s. 11 is general in its words and s. 19 is expressly limited to the cases where a trade mark is calculated to deceive by its close resemblance to that belonging to a different proprietor already on the register with respect to the goods or description of goods in relation to which it is sought to secure registration. It is an exception in the named circumstances to the general rule which is laid down by s. 11. The argument therefore upon the statute in my opinion fails, but I do not think that the matter ought simply to be concluded by this result.

By the Second Schedule to the Trade Marks Act of 1919 power is given to insert limitations on the grounds as to mode or place of user or otherwise. It is argued that under this power it would be right to limit the use of the respondents' mark to goods other than bottled beer, and I think this argument ought to prevail. The respondents' mark was

H. L. (E.)
1931
Bass, Ratcliff and Gretton, Ld. v. Nicholson & Sons, Ld.
Lord Buckmaster.

originally exclusively acquired in connection with cask beer. The use of the appellants' mark most universally recognized is in connection with bottled beer. When the respondents sought a trade mark for bottled beer they selected a design representing a man upon a camel and not bearing the faintest resemblance to the mark that they had used for their cask beer. I cannot find any evidence that this mark has been used by the respondents on bottles. It most certainly was not used before 1875, and, as there is some evidence that in certain districts Bass's bottle beer is referred to as triangle beer, and the draught beer of the respondents is also in certain districts similarly mentioned, it seems to me right that in the circumstances the user which enables them to register should not be so extended as to create the possibility of confusion. There would, I think, be a reasonable danger that deception might arise, and I regard this as sufficient: see *Eno* v. *Dunn*. (1)

With regard to the registration of the use of the word "Triangle," this is a new application. It is not suggested that the word was used as a trade mark before 1875 and, with the success of the respondents' application and the evidence to which I have referred, it seems to me clear that that mark must be removed. Nor do I think it is desirable to limit it in the manner suggested by confining it to bottled beer. The use of a word is in some respects different from the use of a mark of another description, and if the word became the trade mark for one class of beer its use might easily lead to confusion in other respects.

I have carefully considered the question of costs, and in my opinion there should be no other order as to costs of this appeal than that the appellants should pay to the respondents one-third of their costs when taxed.

Lord Warrington of Clyffe (read by Lord Thankerton). My Lords, this is an appeal by Messrs. Bass, the well known brewers, from an order of the Court of Appeal which by a majority (Lawrence and Romer L.JJ.; Lord Hanworth M.R.

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(1) (1890) 15 App. Cas. 252, 261.

dissenting), reversed a judgment of Farwell J., and restored the decision of the Assistant Comptroller of Trade Marks (acting for the Comptroller and Registrar) allowing, with a certain limitation as to the mode of user, the registration of a trade mark claimed by the respondents as an old mark, that is to say, as one in use by them as a trade mark prior to August 13, 1875.

The appellants are the proprietors of a number of trade marks registered in Class 43 in respect of beer. It is unnecessary to say more about these marks than that they all contain as one characteristic a block triangle. The first registration is dated January 1, 1876, and is of the very familiar label used upon bottles of pale ale. It bears the representation of a triangle; round the top are the words "Bass & Co.'s Pale Ale" in Roman capitals and beneath it in script "Bass & Co." It is registered as having been in use twenty years before December 31, 1875.

Since the original registration the appellants have registered a number of other trade marks all characterized by the block triangle. Finally in 1926 they registered a trade mark in respect of "Beer" consisting of the word "Triangle."

The respondents are a firm of brewers of long standing carrying on business at Maidenhead. The mark the subject of the present litigation was registered as of November 5, 1926, in respect of "bitter beer" as an old mark, that is to say, as a mark in use prior to August 13, 1875. It consists of the outline of a triangle broken at each of the three angles, a capital "N" in the centre, and the word "Nicholson" below its base. The following note is by order of the Assistant Comptroller inserted in the register—namely: "The part of the mark consisting of the triangle and the letter N is limited to the colour white or the colour black."

As to the user of the mark by the respondents, it appears that prior to 1865 the firm had been in the habit of marking in chalk by hand on the barrels of bitter beer supplied by them a roughly equilateral triangle. In 1865 and onwards they marked the barrels by using a stencil plate and whitewash. The process of stencilling necessitated the breaking of the angles of the triangle, and there was inserted in the centre of the plate the capital letter "N," the initial letter of the respondents' firm name. The barrels also bore branded on the end the name "Nicholson." From this time forth all barrels of bitter beer supplied by the respondents were marked in white by the broken triangle containing the letter "N," and in addition had branded on them the name "Nicholson." The white triangle was generally placed above the branded name, but in some cases, probably by accident, it was partially superimposed thereon. The Assistant Comptroller, in my judgment rightly, treated the name as part of the trade mark, and the mark as registered includes it as above mentioned.

By s. 3 of the Trade Marks Act, 1905, it is enacted that "a trade mark shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale."

The first question raised by the present appeal is whether according to the true construction of the Act the mark in question was used for the purpose of indicating that the beer in connection with which the mark was used was that of Messrs. Nicholson. The appellants contend that the only purpose in the minds of the brewers was to indicate the quality of the beer supplied in the barrels marked as above described. In fact, however, the mark as used did indicate that the beer contained in the barrels on which it was marked was beer brewed by Messrs. Nicholson, and in my opinion it makes no difference that it further indicated that it was their beer of a particular quality. On this point I entirely agree with the views expressed by Lawrence and Romer L.JJ., and I cannot usefully add anything to what they have said.

But the appellants raise further objections to the registration of the respondents' trade mark. They say that, assuming it to be a trade mark within the definition, its use would be calculated to deceive and its registration would be prohibited by s. 11 of the Trade Marks Act, 1905.

The respondents' answer to this objection is based on s. 19 of the Act, which they say excepts their trade mark from the general prohibition contained in s. 11.

The solution of the question thus raised involves the consideration of the true construction of several sections of the Act.

Sect. 9 contains a list of essential particulars of a registrable trade mark enumerated under heads (1.), (2.), (3.), (4.) and (5.). Words and names for this purpose are strictly limited by (3.) and (4.), and must fulfil the conditions there specified, and by (5.) a name or word or words not falling within the descriptions in (1.), (2.), (3.) and (4.) shall not be registrable except upon evidence of its distinctiveness—Act of 1919, s. 7. All these provisions are, however, qualified by the following proviso: "Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessor in business before the thirteenth day of August, one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark."

The effect of this proviso is obviously to except old word marks, as I may call them for brevity's sake, from the strict limitations imposed by the preceding part of the section. It does not mention a mark consisting of a device because no such mark could in any case be registered unless it were distinctive, and there was therefore no object in making any distinction in this respect between old and new marks of that description. That the operation of the proviso is thus limited is an important fact to be borne in mind in considering the other relevant sections of the Act.

I now pass to s. 11, which is in the following terms: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design."

This is a perfectly general provision, its object being to keep off the register any matter the use of which would be disentitled to protection in a court of justice. A mark may be so disentitled as calculated to deceive for other reasons than that it closely resembles or is identical with another mark, as for example if it makes a false representation as to the nature or quality of the goods. On the other hand a mark identical with or closely resembling another mark may be so used as not to be calculated to deceive and may thus be entitled to protection, of a limited character it may be, in a court of justice. That this may be so is recognized in the Act itself (s. 21 dealing with honest concurrent user), and before the Act circumstances can easily be imagined in which as against a wrongdoer a trader would be entitled to protection for his mark notwithstanding that another trader may have used the same mark under such circumstances as in like manner to be entitled to protection.

The next material section is s. 19: "Except by order of the Court or in the case of trade marks in use before the thirteenth day of August, one thousand eight hundred and seventy-five, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive."

This section differs from s. 11, inasmuch as it contains a specific prohibition of registration in the case of marks which are calculated to deceive by reason of identity with or near resemblance to another mark on the register, but this prohibition is subject to two exceptions, first where the Court has made an order for registration (see ss. 20 and 21), and secondly in the case of old marks. This seems to me to recognize the fact already pointed out that the use of an old mark would not necessarily be disentitled to protection in a court of justice by reason of its identity with or near resemblance to another mark used in respect of the same goods or class of goods, and that it would therefore not be right to include such a mark in the specific prohibition contained in this section. The provision of s. 19 therefore in my opinion is either a specific exception of an old mark from the general prohibition contained in s. 11 or a recognition of the fact that an old mark is not within that section merely because it is identical with another mark or so nearly resembling it as to be calculated to deceive. The result is that in whichever way the section is regarded an old mark such as is described in the section is capable of registration.

It was contended that the section only refers to such old marks as are specified in the proviso to s. 9—I cannot accept this contention; I have already pointed out what is in my opinion the effect of this proviso. It seems to me to have nothing to do with s. 19. This section refers to all trade marks in use before August 13, 1875, and I can see no ground for restraining its operation to marks of a particular character.

I am of opinion, therefore, that so far as it seeks to set aside the registration of the respondents' trade mark the appeal fails and must be dismissed.

But there remains the question what limitations as to mode or place of user or otherwise should be imposed (see Act of 1919, Sch. II.).

A very wide discretion in this matter is conferred both upon the Registrar and upon the Court. In the present case the Assistant Comptroller has imposed only the following limitation as to mode of user—namely, "The part of the mark consisting of the triangle and the letter N is limited to the colour white or the colour black." The appellants contend that there should be imposed a further limitation excluding the use of the mark in connection with bottled beer.

In my opinion the limitation now asked for by the appellants should be added to that imposed by the Assistant Comptroller. It appears from the judgment of the Assistant Comptroller and from the discussion on this subject before the Court of Appeal that the limitation then asked for by the appellants took the form of a limitation of user to user

Lord Warrington of Clyffe.

on casks or barrels—namely, to user upon containers of a particular kind, and it was pointed out on the part of the respondents that such a limitation might have the effect of preventing them from taking advantage of the invention of new forms of containers and thus unduly hamper them in the legitimate conduct of their business. There is much to be said for this view, and if the further limitation asked for in this House had taken the same form I think I should have agreed with the decisions of the Assistant Comptroller and of the Court of Appeal. But this is not the case. The appellants now ask that after the words "bitter beer" there be added the words "not including bottled beer." In this form the proposed limitation affects the class of goods in connection with which the mark is registered rather than the mode of user and is not open to the objection I have referred to, and by adding it to the existing limitation this House would not be overriding the discretion of the Assistant Comptroller or the Court of Appeal, inasmuch as the limitation now proposed has not been considered by them respectively.

In my opinion "bottled beer" is an article of trade distinct from beer sold in casks or barrels. It has distinct qualities, notably that of effervescence, resulting, I believe, from the fact that it undergoes a further process of fermentation. If draught beer were simply drawn into a bottle such as that generally used for bottled beer it would soon become flat and unpalatable. Moreover, the trade in bottled beer is conducted by different people and in a different manner from that in beer sold in casks or barrels. It is habitually sold in grocers' shops, for example, whereas beer in casks is usually sold either direct to private customers or to licensed victuallers.

Bottled beer again is frequently stacked by those who sell it in such a manner that the distinguishing labels are visible to customers. If the respondents' mark were used upon bottles in the same way as the appellants' mark is used and such bottles were stacked in like manner I think there is considerable risk of confusion ; I am prepared to accept the evidence tendered by the appellants that an intending purchaser seeing a triangle on the bottle might well think that it was a new form of the appellants' mark and that the name only indicated the bottler.

Then, again, the user by the respondents of their mark, as a result of which they have obtained registration, has always been confined to use on casks and barrels. In fact, for use in connection with bottled beer they have a separate trade mark, that of the camel.

I do not attach much importance to the abortive negotiations between Mr. Nicholson and Mr. Burt in 1920–21 and 1922, but it is the fact that throughout those negotiations all that Mr. Nicholson sought to retain was the right to use the mark as it had theretofore been used—namely, on casks and barrels.

For these reasons I think the words " not including bottled beer " should be added to the note at present on the register.

As to the appellants' trade mark consisting of the word " Triangle " I agree with the opinion of the majority in the Court of Appeal that this must be expunged from the register as a consequence of the registration of the respondents' mark, which includes a triangle.

It follows that with the variation mentioned above the appeal fails and must be dismissed. The variation, however, is a gain of considerable value to the appellants and some portion of the respondents' costs should be borne by themselves. I agree with the order as to costs proposed from the Woolsack.

LORD RUSSELL OF KILLOWEN (read by LORD TOMLIN). My Lords, the main question for decision on this appeal is whether Nicholsons are entitled to have registered as a trade mark under the Trade Marks Acts, 1905 to 1919, a mark consisting of the device of a triangle broken at the angles, with a capital letter " N " inside the triangle and the word " Nicholson " in capital letters beneath. The proposed registration is in Class 43 for bitter beer.

Farwell J., who heard the case on appeal from the decision of the Registrar, has stated the facts so fully and accurately that I do not propose to refer to them, except to call attention to the fact that Nicholsons (who have for many years carried

H. L. (E.)
1931

BASS, RATCLIFF AND GRETTON, LD.
v.
NICHOLSON & SONS, LD.

Lord Russell of Killowen.

on a substantial business as brewers) have ever since the year 1865 used the mark in question upon barrels containing a pale ale brewed by them, which is their best quality bitter beer. The triangle with the "N" inside has since 1865 been stencilled in white upon the ends of their barrels, the word "Nicholson" being also branded there. The white stencil mark as a general rule was placed over the word "Nicholson," though it happened in some cases that, owing to the position of the branded word, the stencil mark could not be placed so as to be clear of the name.

Once such continuous user since 1865 has been established, it is evident that in order to succeed the opponents must put forward strong grounds for their opposition.

In the present case the opponents are Messrs. Bass, whose name and reputation as brewers are well known, and who are the registered proprietors of various trade marks the leading feature of which consists of a solid block triangle. They oppose the registration of Nicholsons' mark on various grounds the validity of which I now proceed to examine.

In the first place they say that the mark (which Nicholsons claim to be what is generally called an old mark) was not an old mark at all, because it had not been used as a "trade mark" within the meaning of s. 3 of the Act of 1905. It was, they say, used as a quality mark, and therefore was not, as required by s. 3, used upon or in connection with goods "for the purpose of indicating that they are the goods of the proprietor of such trade mark." This contention is in my opinion based upon a fallacy. It is based upon the view that a quality mark can only be a quality mark, and cannot also indicate that the goods are the goods of the person who uses the mark. There are no doubt quality marks which are incapable of conveying this indication. Such are quality marks which are common to the trade. A quality mark which is common to the trade must necessarily denote a quality which is common to the trade, and can denote no more. Thus a quality mark such as XXX (which is now common to the trade and denotes the specific gravity of beer) cannot be used for the purpose of indicating that the beer comes from a particular source. But a quality mark which is peculiar to one manufacturer (as is the case here) necessarily denotes a particular quality of the goods of that particular manufacturer, and therefore necessarily denotes origin, and is therefore necessarily used upon or in connection with goods not only as a quality mark but also for the purpose of indicating that the goods are the goods of the proprietor of the mark.

Nor is it in my opinion necessary in this connection to establish that the mark has been recognized by the public as a mark distinctive of the user's goods. The reasoning of Lawrence and Romer L.JJ. satisfies me upon this point.

I am accordingly of opinion that the mark proposed to be registered was used by Nicholsons as a trade mark, within the meaning of s. 3, before August 13, 1875, and unless some further objection prevails it is registrable as a trade mark under the Act.

The second point taken by the opponents involves a consideration of ss. 11 and 19 of the Act. They say that the mark which it is proposed to register so nearly resembles the Bass trade marks with the block triangles as to be calculated to deceive, and that its registration is therefore made unlawful by s. 11. Nicholsons, while denying any likelihood of deception, say in answer that since their mark is an old mark, s. 19 authorizes its registration notwithstanding the provisions of s. 11; to which contention the opponents reply that the provisions of s. 19 in relation to old marks apply only to old marks which answer (and Nicholsons' mark does not) the description contained in the proviso to s. 9.

I will assume for this purpose that such a resemblance exists that Nicholsons' mark is calculated to deceive; and upon this assumption I turn to the sections in question, the language of which needs careful consideration.

Sect. 11 prohibits the registration of three things only—namely: (1.) any matter the use of which would be disentitled to protection in a court of justice; (2.) any matter the use of which would be contrary to law or morality; and (3.) any scandalous design. An instance is given under the first head of a reason for withholding from particular matter the protection of the Court—namely, "its being calculated to deceive": but it is to be observed that the likelihood of deception which is contemplated by s. 11 need not necessarily flow from any resemblance between the matter proposed to be registered and other matter, or another mark. It might flow from something contained in the matter proposed to be registered, as, e.g., a misleading description of the goods upon or in connection with which the matter was intended to be used. In short, s. 11 (so far as relevant) is a prohibition in general terms of the registration of matter the use of which would not be protected in a court of justice.

I turn now to s. 19. This section is in specific terms and deals with the case where there is already on the register a trade mark in respect of any goods or description of goods; and it prohibits the subsequent registration of any trade mark in respect of those goods or that description of goods which is identical with the registered mark or so nearly resembling it as to be calculated to deceive. From that prohibition, however, two exceptions are made, one of which is the case of "trade marks in use before the 13th August, 1875."

The effect of s. 19 in regard to such old marks as fall within that exception seems to me reasonably plain. It operates inferentially as a specific authorization for placing such an old mark upon the register notwithstanding that it may be identical with a mark already there or so nearly resembling it as to be calculated to deceive. Thus one of the cases (namely, an old mark identical with or closely resembling an already registered mark) which would otherwise fall within the general prohibition contained in the first head of s. 11 is specifically authorized by the operation of s. 19. This authorization of a specific case must, it seems to me, overrule the general provision of s. 11. To put the matter in another way, the fact that s. 19 excepts this specific case from its prohibition makes it impossible, in my opinion, to say that the registration of an old mark would be registration of matter the use of which would be disentitled to protection in a court of justice.

There remains the question whether Nicholsons' mark is such an old mark as falls within the exception of old marks contained in s. 19. Upon this point I feel no doubt. The words of s. 19 in their natural meaning refer to and include all trade marks in use before the relevant date, and no sufficient reason has been adduced for restricting them to marks of a particular description.

The second point urged by the opponents accordingly fails.

While the appeal on the main question is unsuccessful, I agree that, for the reasons already given by your Lordships, the powers conferred by s. 12, sub-s. 2, of the Act of 1905 as amended by the Act of 1919 may properly be exercised in favour of the opponents ; and that in addition to the limitation already imposed the words "not including bottled beer" should be added to the register after the words "Bitter Beer" in the description of goods.

I also agree that the registration of Nicholsons' mark involves as a consequence the removal from the register of the trade mark consisting of the word "Triangle."

The appeal accordingly must be dismissed ; and in view of the additional limitation which is being placed upon Nicholsons' user of the trade mark, I concur in the special order as to costs which has been proposed.

Lord Macmillan. My Lords, the respondents, Messrs. Nicholson & Sons, Ld., who carry on business as brewers at Maidenhead, are applicants for the registration as a trade mark in Class 43 for bitter beer of a device consisting of an equilateral triangle in outline, the lines forming the sides being broken at the corners, with the letter "N" enclosed and the name "Nicholson" printed in capitals below the triangle. They claim that they and their predecessors in business have used this trade mark in respect of bitter beer continuously since a date prior to August 13, 1875, and they consequently maintain that they are entitled to the privileges which the Trade Marks Act of 1905 confers on trade marks in use before that date.

The application is opposed by Messrs. Bass, Ratcliff & Gretton, Ld., the appellants, who are the proprietors of a trade mark consisting of a solid or block equilateral triangle registered by them in 1876 for pale ale and in 1883 for beer and also of their well known trade mark label with a red triangle in the centre registered for both pale ale and beer. They allege in their notice of opposition that the device of a triangle is regarded as indicating ale of their brewing, and that the mark which the respondents seek to register in so far as it consists of a triangular device is calculated to deceive and if applied to malt liquors will cause such goods to be passed off and sold as and for the appellants' goods. They further deny that the mark which the respondents seek to register has been used by them as a trade mark in respect of bitter beer continuously since prior to August 13, 1875, or at all.

It is not now in controversy that since the year 1865 the respondents have been in the practice of stencilling in white on the heads of the casks containing their best quality of pale ale a triangle in outline with the letter "N" enclosed and also of branding the name "Nicholson" on the heads of their casks, so that the triangular device and the name have always appeared together.

The first question which arises is whether the mark comprising these features, which it is now sought to register, complies with the statutory requirements of a registrable trade mark. According to s. 3 of the Act of 1905 a trade mark means "a mark used . . . . upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture . . . ." The appellants have strenuously maintained before your Lordships that the application fails here at the very threshold for the reason, as they allege, that the respondents have used their triangular device not "for the purpose of indicating" that the casks on which they placed it contained beer of their manufacture but solely as an indication of the quality of the beer contained in the casks. It is no doubt of the essence of a trade mark that it should indicate origin and be used as indicative of origin and not merely as indicative of the quality of the goods. The distinction is a real one, but there is nothing to prevent a mark on goods being used to serve both purposes, for they are not necessarily mutually exclusive. A mark originally adopted to indicate that the goods to which it is applied are of a particular quality may readily come to be recognized as indicating that they are the produce of the manufacturer who makes goods of that quality. When the Act requires that a mark to be qualified for registration as a trade mark must have been used "for the purpose of indicating" the origin of the goods in connection with which it is used, I do not think that any deliberate resolution to that effect on the part of the user of the mark is contemplated. It is enough if in practice the mark has been so used as to denote the origin of the goods. I do not think that it is essential to prove in addition, as Lord Esher suggests, that the market has accepted it as a distinguishing mark (*Richards* v. *Butcher* (1)), although such evidence may be valuable in fortification.

In the present case it may well be that the chalking of a triangle without the letter "N" on the heads of casks containing the respondents' best quality of bitter beer was originally a matter of domestic convenience in their brewery and was intended only to differentiate these casks from casks containing other qualities of their beer. But when the respondents in 1865 caused a stencil to be made and deliberately inserted the letter "N" in the centre of the triangular stencil I think the inference is irresistible that they thenceforward used the mark as an indication not only to themselves of the quality of the beer in the casks so marked but as an indication to their customers and to the public that casks so marked contained beer of their manufacture. To the question why the letter "N" was added, unless it was to indicate that the beer was Nicholsons' beer, no satisfactory answer was forthcoming from the appellants. It was not necessary for the purpose of denoting quality; the triangle alone had achieved this for many years.

(1) [1891] 2 Ch. 522, 543.

When to the circumstances of the adoption of the stencilled device in 1865 is added the evidence of its continuous use and recognition thereafter in the respondents' ordinary trade I have little difficulty in reaching the conclusion that the mark has been used by them for the purpose of indicating that the casks to which it has been applied contained beer of the respondents' manufacture. It follows that I am of opinion that the mark has been used as a trade mark or has been in use as a trade mark by the respondents since before August 13, 1875, and is therefore entitled to such privileges as the Act accords to what are conveniently called "old marks."

I should add that in reaching this conclusion I have attached little importance to the correspondence between the parties in 1920–22. It was an attempt to reach an accommodation and it failed. I do not think that the inexpert use of certain terms in the letters affords any reliable material for the solution of the technical questions now to be decided.

It was contended that even if the triangle with the "N" in the centre was used by the respondents as a device to distinguish their goods before 1875 they never conceived the name "Nicholson" to be part of the device. In evidence of this the appellants refer to the fact that the respondents' original application did not contain the name below the triangle. The mark now sought to be registered by the respondents is thus in any event, it is said, not the mark which they themselves used as, or conceived to be, their trade device. But, as Kay J. points out in *Richards* v. *Butcher* (1), user as a trade mark does not mean "what the person who uses has in his own mind about it . . . . but what the public would understand when the trade mark or so-called trade mark is impressed upon the goods . . . . to be the trade mark." Inasmuch as the name "Nicholson" was in fact always branded on the casks in association with the triangular device I think that the Registrar rightly required the name to be included in the trade mark sought to be registered, for what has in fact been used as a trade mark must be registered as a whole, and it is immaterial that the respondents did not appreciate that the name must be treated as part of their mark if in point of fact it was always used in conjunction with the triangle. The presence of the name serves moreover to diminish the possibility of confusion with the appellants' trade marks.

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(1) [1891] 2 Ch. 522, 532.

The Act of 1905 by s. 9 further requires that a trade mark in order to be registrable must contain or consist of at least one of an enumerated series of essential particulars among which the fifth is "any other distinctive mark." The respondents' trade mark in my opinion answers this requirement, for it consists of a "distinctive mark," within the meaning given to the word "distinctive" by the section—namely, "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons."

So far then the respondents would seem to possess a registrable trade mark which they have used since before 1875 to denote beer of their manufacture. It may be added that they have used it honestly and without, so far as appears, a single instance of confusion having arisen with any other manufacturer's mark. Their mark has thus the positive qualifications for registration prescribed by the statute. The question remains whether it is disentitled to the benefit of registration by reason of its being obnoxious to any of the negative restrictions on registration contained in the statute. It thus becomes necessary to consider the effect and applicability of ss. 11 and 19 of the Act.

There are obviously two main interests to be protected when a trade mark is presented for registration. There is first the interest of the public. A trade mark ought not to be registered if its use will be apt to mislead the public as to the origin of the goods they are purchasing. There is also the interest of other existing traders who are entitled to object if the use of the trade mark proposed for registration will be calculated to enable the applicants' goods to be passed off on the public as such other traders' goods. The statute is accordingly concerned to see that these interests are duly protected: see ss. 11 and 19. At the same time it was thought proper to show some consideration for the trader who had honestly used the mark which he sought to register, particularly if it was an "old mark," notwithstanding that owing to its identity with or resemblance to an existing registered trade mark there might be some possibility of confusion or deception, and not on that account alone to deprive him of all benefit under the Act: see ss. 19, 20, 21. Finally, as a means of accommodating conflicting rights and interests and doing justice all round, the Act empowers the Registrar to accept an application for registration subject to conditions, amendments or modifications or to such limitations if any as to mode or place of user or otherwise as he may think right to impose: see s. 12, sub-s. 2, as amended by the Act of 1919.

Such being the general scheme of the enactment I proceed to consider more closely its application to the present case. As regards s. 19, the respondents' trade mark, having been in use before August 13, 1875, is plainly excepted from its operation. Now, although this section is expressed in the negative form of a prohibition against the registration of a trade mark identical with an existing registered trade mark belonging to a different proprietor for the same goods or description of goods, or so nearly resembling such trade mark as to be calculated to deceive, I think that the exemption of the respondents' trade mark from this prohibition carries the positive implication that it is permissible to authorize its registration even although it may so nearly resemble the appellants' trade mark as to be calculated to deceive. I should add that in my opinion the exception in s. 19 of "old marks" extends to all "old marks" and not merely, as was contended, to the particular class of "old marks" mentioned in the proviso to s. 9.

There still remains s. 11. In my opinion the generality of that section must be read as qualified in the case of "old marks" by the exception in favour of "old marks" contained in s. 19. If, as contemplated by s. 19, a trade mark so resembling an existing registered trade mark as to be calculated to deceive were ordered by the Court to be registered the Registrar plainly could not reject it under s. 11. The order of the Court would have settled that its use was not disentitled to protection in a court of justice. Similarly in the case of an "old mark," which is equally excepted from the operation of s. 19, the sole fact that it so resembles an existing registered trade mark as to be calculated to deceive does not render it subject to the prohibition in s. 11. I do not say, nor is it necessary to hold, that the exemption of "old marks" from the operation of s. 19 absolves "old marks" altogether from the operation of s. 11, but in my opinion it does impliedly authorize the Court to sanction the registration of an "old mark" although its resemblance to an already registered trade mark of another trader is such as to be calculated to deceive.

Now it is on the ground that the respondents' trade mark so nearly resembles theirs as to be calculated to deceive that the appellants resist its registration. Having regard to the evidence I am of opinion that the unrestricted use by the respondents of their trade mark for bitter beer might by reason of its resemblance to the appellants' well known triangular mark lead to confusion or deception. In view of the terms of s. 19, I do not, however, think that on this ground the Court is bound by s. 11 to refuse to authorize its registration. But while it is thus in my opinion permissible under the statute to authorize the registration of the respondents' trade mark, notwithstanding that its resemblance to the appellants' trade mark might in some circumstances lead to confusion, the Court has still a discretion as to whether the registration should or should not be authorized. Here the value of the power to impose conditions is manifest. In exercising its discretion the Court may well have regard to the possibility of deception which in my opinion would attend the unrestricted use by the respondents of their trade mark, and to obviate or minimize that risk may attach suitable restrictions in authorizing registration., The Registrar has already imposed a colour restriction by limiting the part of the mark consisting of the triangle and the letter "N" to the colour white or the colour black, which goes so far to prevent confusion.

I am, however, in agreement with your Lordships in thinking that a further limitation should be imposed and that the respondents should be precluded from using their trade mark for bottled beer. The respondents have never in fact used their trade mark for bottled beer, and it is in connection with the appellants' trade in bottled beer that the possibility of confusion mainly arises, as Farwell J. points out. I, therefore, think that the imposition of this additional limitation on the respondents' use of their trade mark as a condition of its registration will have the result of according to the parties a reasonable recognition of their respective interests and to the public an adequate measure of protection. Subject to this variation the judgment of the Court of Appeal on the respondents' application for registration should in my opinion be affirmed.

As regards the respondents' application for rectification of the register by the removal of the appellants' trade mark consisting of the word "Triangle" registered in 1926, I am of opinion that this application must succeed in view of your Lordships' decision on the respondents' application for registration of their triangular trade mark. This branch of the appeal therefore also fails.

As to costs, I concur in the proposal of your Lordship on the Woolsack.

Order of the Court of Appeal varied, by amending the specification of goods in respect of which trade mark 474,612 *is registered, to read as follows: "Bitter Beer, but not including bottled beer," and subject to such variation affirmed and appeal dismissed. The appellants to pay to the respondents, Nicholson & Sons, Ld., one-third of the costs incurred by them in respect of the said appeal.*

Lords' Journals, Dec. 8, 1931.

Solicitors for the appellants: *McKenna & Co.*

Solicitors for the respondents: *Stephenson, Harwood & Tatham.*

Considered. Leaf v. International Galleries [1950] 2 K. B. 86

[HOUSE OF LORDS.]

BELL and Another . . . . Appellants ;

H. L. (E.)*

1931

Dec. 15.

and

LEVER BROTHERS, LIMITED, and Others . . . . } Respondents.

Mistake—Mutual Mistake—Mistake as to Legal Rights—Pleadings—Fiduciary Relation—Breach of Duty—Non-disclosure—Rescission of Contract.

The L. Company, who held more than 99 per cent. of the share capital of the N. Company, agreed with one B. that he should be in the service of the L. Company for a term of years during which he should act as chairman of the board of directors of the N. Company at a salary of 8000*l.* a year. They made a similar agreement with one S. that he should be vice-chairman of the board at a salary of 6000*l.* a year. While acting as chairman and vice-chairman respectively, B. and S. entered on their own account into secret speculations in cocoa, a commodity in which the N. Company dealt, of such a character as, on the finding of the jury in answer to a specific question, would have justified the L. Company in terminating their agreements of service and the N. Company in dismissing them from their offices of chairman and vice-chairman. Subsequently the N. Company became amalgamated with another company, and it became necessary to cancel the appointments of B. and S. as chairman and vice-chairman. Being unaware of the aforesaid breaches of duty by B. and S., the L. Company agreed to pay to B. 30,000*l.* and to S. 20,000*l.* as compensation for terminating their services; B. and S. agreed to accept these sums, and they were duly paid. The jury, in answer to a further specific question, found that the L. Company if they had been aware of the breaches of duty by B. and S. would have terminated their agreements, and B. and S. would have been dismissed from their offices without any compensation. The action in which the jury so found was brought in the first instance by the L. Company alone, the N. Company being joined in the course of the proceedings as co-plaintiffs, against B. and S., claiming rescission of the compensation agreements and repayment of the sums paid thereunder on the ground of fraudulent misrepresentation and alternatively, as the House construed the points of claim, on the ground of unilateral mistake induced by fraud, but not on any ground of mutual mistake innocently made by the defendants so far as they were concerned. There was a specific alternative claim that the agreements of settlement and the payments under them were made under a mistake of fact. The jury negatived the charges of fraud, and found that at the time of negotiating the compensation agreements B. and S. had not in mind their breaches of duty.

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* *Present:* Viscount Hailsham, Lord Blanesburgh, Lord Warrington of Clyffe, Lord Atkin, and Lord Thankerton.

Wright J., being of opinion on the construction of the points of claim that an issue based upon an allegation of mutual mistake was thereby raised, and the Court of Appeal, being of opinion that if that issue were not raised the pleadings should be treated as amended in order to raise it, held that the compensation agreements were void, having been made under a common mistake as to the legal relation between the parties, each party believing, contrary to the truth, that the one was entitled to claim and the other was bound to pay compensation.

The Court of Appeal held further, although such a case had not been raised before Wright J., that each of the defendants owed a duty to the plaintiffs to disclose their breaches of duty, and that their non-disclosure invalidated the compensation agreements.

The defendants appealed:—

Held, first, by Lord Blanesburgh, with special reference to the course of the trial and the circumstances of the case, that any amendment of their pleadings to enable the plaintiffs to raise a case of mutual mistake implying good faith on the part of the defendants could not without injustice to them be allowed after an action based exclusively on fraud had failed, and that accordingly the issue was not open to the plaintiffs in this House. But on the footing that the points of claim were amended so as to raise the issue.

Held, by Lord Blanesburgh, Lord Atkin and Lord Thankerton (Viscount Hailsham and Lord Warrington of Clyffe dissenting), that the action failed: as to mutual mistake, on the ground that the mutual mistake related not to the subject-matter, but to the quality of the service contracts; as to unilateral mistake, on the ground that the defendants under their contracts of service with the L. Company owed no duty to them to disclose the impugned transactions.

Kennedy v. *Panama, New Zealand and Australian Royal Mail Co.* (1867) L. R. 2 Q. B. 580 followed.

Dictum of Avory J. in *Healey* v. *Société Anonyme Française Rubastic* [1917] 1 K. B. 946, 947 approved.

Decision of the Court of Appeal [1931] 1 K. B. 557 reversed.

APPEAL by the defendants from an order of the Court of Appeal affirming a judgment of Wright J., upon the trial of the action with a special jury, whereby it was ordered that two agreements (hereinafter called "the agreements of settlement") made between the respective appellants and the respondents, Lever Brothers, Ld., should be set aside and that the moneys paid thereunder should be repaid by the appellants.

The facts are stated in the report of the case in the Courts below, and in the opinions of Lord Blanesburgh and Lord Atkin, and the following summary is merely for the purpose of explaining the position of the parties and the nature of the dispute.

Under two agreements of employment made between the respondents, Lever Brothers, Ld., and the appellants, Mr. H. E. Bell and Mr. W. E. Snelling, the appellants were employed, in the case of Bell, to act as chairman of the respondents, the Niger Company, in which Lever Brothers had a controlling interest, and in the case of Snelling, to look after the interests of Lever Brothers in West Africa, and in pursuance of these agreements Mr. Bell was appointed chairman and Mr. Snelling vice-chairman of the Niger Company. These agreements were to last for a period of five years, subsequently extended for a further period of five years. In the spring of 1929, when the agreements of employment, as extended, had a substantial time to run, an amalgamation was arranged of the business of the Niger Company and the African and Eastern Trade Corporation, and, as the amalgamation afforded no scope for the appellants, the chairman of Lever Brothers negotiated with each of the appellants to give up his position in the Niger Company, and to put an end to his agreement of employment for monetary compensation. The agreements of settlement were duly arrived at and the compensation was paid. After the compensation had been paid the respondents Lever Brothers were informed by the appellant, Mr. Bell, that the appellants, when chairman and vice-chairman of the Niger Company respectively, had secretly entered into certain speculative transactions in cocoa on their own account, transactions which the jury, under direction from the learned judge as to the law, found would have given the respondents the right to dismiss the appellants summarily and to determine the appellants' agreements of employment without notice and without payment of compensation. The jury also found that this right would have been exercised by the respondents if they had known the facts. At the time when the agreements of settlement were being negotiated the said breaches of duty, as the jury found, were not present to the minds of the appellants. In these circumstances the respondents, Lever Brothers, commenced an action, to which the respondents, the Niger Company, were subsequently added as co-plaintiffs, claiming (inter alia) rescission of the agreements of settlement and repayment of the compensation on the ground of fraudulent misrepresentation and concealment, which charges were, however, negatived by the jury.

There was an alternative claim, which the House construed to be a claim to rescission on the ground of unilateral mistake induced by fraud, but which in the Courts below was either construed as an allegation of common mistake or was treated as amended so as to involve such an allegation.

In these circumstances Wright J. gave judgment for the plaintiffs (the respondents) on the ground of mutual mistake as to the fundamental basis of the agreements of settlement, being of opinion that both parties entered into those agreements in the common belief that the agreements of employment could not be put an end to without the consent of the appellants.

The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.), in affirming the judgment of Wright J., held that the agreements of settlement should be set aside: (1.) on the ground of mutual mistake, and (2.) on the ground of the failure of the appellants to disclose their past breaches of duty.

1931. June 23, 25, 26, 29, 30; July 2, 3, 6.

Schiller K.C. and *Pritt K.C.* (with them *Vos*) for the appellants.

1. There was here no mutual mistake such as to avoid the agreements of settlement. There was no mistake as to the existence or identity of the contracts which formed the subject-matter of the agreements for settlement, and the fact that the parties contracted in ignorance of some fact affecting the quality of the subject-matter as distinct from its existence or identity is not a ground for avoiding the agreements.

[They referred to *Smith* v. *Hughes* (1); *Scott* v. *Coulson* (2); *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (3); *Cooper* v. *Phibbs* (4); *Mackay* v. *Dick* (5);

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(1) (1871) L. R. 6 Q. B. 597, 606.

(2) [1903] 1 Ch. 453; [1903] 2 Ch. 249.

(3) (1867) L. R. 2 Q. B. 580, 587, 588.

(4) (1867) L. R. 2 H. L. 149, 164, 170.

(5) (1881) 6 App. Cas. 251, 265.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.

Couturier v. *Hastie* (1); *Strickland* v. *Turner* (2); *Pope & Pearson* v. *Buenos Ayres New Gas Co.* (3); *Gompertz* v. *Bartlett* (4); *Balfour* v. *Sea Fire Life Assurance Co.* (5); *Taylor* v. *Caldwell* (6); *Galloway* v. *Galloway* (7); *Barr* v. *Gibson* (8); *Okill* v. *Whittaker* (9); *Harris* v. *Pepperell* (10); *Paget* v. *Marshall* (11); *May* v. *Platt* (12); *Trigge* v. *Lavallée* (13); *Gill* v. *McDowell* (14); Benjamin on Sales, 7th ed., p. 126.]

2. As to non-disclosure: a unilateral mistake as the result of an innocent concealment does not justify the Court in rescinding the contract. These were ordinary service agreements, and the appellants were under no duty to disclose their past misdeeds either to the Niger Company or to Lever Brothers. It is only in contracts where uberrima fides applies that that duty exists—e.g., in the case of an insurance policy or in cases where a fiduciary relationship exists between the parties: *Healey* v. *Société Anonyme Française Rubastic* (15); *Boston Deep Sea Fishing Co.* v. *Ansell* (16); *Ramsden* v. *David Sharratt & Sons, Ld.* (17); *Fletcher* v. *Krell.* (18)

total good
faith

[They also referred to *Phillips* v. *Foxall.* (19)]

3. Mutual mistake was not pleaded and was not raised at the trial until the evidence was completed, but the case was fought entirely upon fraud. In these circumstances it is submitted that that point is not open to the respondents.

Sir John Simon K.C. and *Wilfrid Lewis* (with them *Stuart Bevan K.C.* and *George Bankes*) for the respondents.

1. The contracts which the cancellation agreements were to determine were contracts of service with Levers to manage the Niger Company, and what was being bought for 50,000*l.* by the cancellation contracts was the right to get rid of the

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(1) (1856) 5 H. L. C. 673.
(2) (1852) 7 Ex. 208.
(3) (1892) 8 Times L. R. 516, 758.
(4) (1853) 2 E. & B. 849.
(5) (1857) 3 C. B. (N. S.) 300.
(6) (1863) 3 B. & S. 826.
(7) (1914) 30 Times L. R. 531.
(8) (1838) 3 M. & W. 390.
(9) (1847) 1 De G. & Sm. 83; 2 Ph. 338.
(10) (1867) L. R. 5 Eq. 1.
(11) (1884) 28 Ch. D. 255.
(12) [1900] 1 Ch. 616.
(13) (1863) 15 Moo. P. C. 270.
(14) [1903] 2 I. R. 463.
(15) [1917] 1 K. B. 946, 947.
(16) (1833) 6 C. & P. 15.
(17) (1930) 35 Com. Cas. 314, 319.
(18) (1873) 28 L. T. 105.
(19) (1872) L. R. 7 Q. B. 666, 680.

appellants. There was abundant evidence upon which the Courts below could come to the conclusion that the cancellation agreements were entered into on a fundamental basis which was assumed to exist but which did not exist. The respondents' dispute is not as to the law, but as to the application of the law to the particular facts. If the mistake is merely a mistake as to the quality of something, and there is no warranty as regards that quality, the maxim caveat emptor applies. The difficulty is to decide whether in a given state of facts the mistake is a mistake of quality or is a mistake as to subject-matter. Cases on the avoidance of contracts on the ground of mistake or on analogous grounds have been classified under four heads: (1.) mutual mistake; (2.) impossibility of performance; (3.) commercial frustration; (4.) implied condition; but one principle applies to them all. In every case the parties contract upon a contractual assumption which is false and which on the facts is found to lie at the very root of the contract. Then, if the assumption is not true, the contract is avoided. The assumption must be contractual and fundamental. If the fundamental thing is something which is assumed to exist when it was not there, the fact that some incidental thing may remain outstanding does not affect the question. On the construction of these agreements for service the appellants were contractually bound to give up, on the termination of the agreements, their positions in the companies in which Levers had a commanding interest, because that was the way in which they were serving Levers, and not only were they contractually bound, but there was no pecuniary benefit to be derived from retaining those positions, as they would have been obliged to account to Levers for their consideration. In any case this point has never been taken. The substance of the case is that Levers wished to get something which they had not then got the right to—to terminate the service agreements with the appellants—and the fact (if it be the fact) that there were some incidental things which would not be covered by the express terms of the service agreements does not go to the substance of the matter. In the respondents' submission all the authorities can be reconciled on the following general principle: Wherever it is to be inferred from the terms of the contract or from its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption which is not true, the contract can be set aside—i.e., it is avoided ab initio if the assumption is of present fact, and it ceases to bind if the assumption is of future fact when that assumption is shown to be untrue. This proposition is dealing with cases where a consensus has been reached—not with cases where there has never been a consensus at all. [They referred to *Kennedy* v. *Panama, &c., Royal Mail Co.* (per Blackburn J.) (1); *Krell* v. *Henry* (per Vaughan Williams L.J.) (2); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (per Earl Loreburn) (3); *Bank Line* v. *Arthur Capel & Co.* (per Lord Sumner) (4); Anson on Contracts, ch. vi.] The question really turns on where the line is to be drawn between a mistake as to quality and a mistake as to essence. In this case the erroneous assumption was essential to the contract. 2. As to non-disclosure: under the special terms of their contracts of service the appellants were under a duty to disclose their illicit dealings, and the fact that those dealings were not present to their minds at the time the contracts of settlement were negotiated affords no excuse. 3. As to the question whether the issue of mutual mistake was pleaded or was open, assuming the pleading to be obscure, Wright J. treated the issue as open, and for that reason no amendment was asked for, and all the facts necessary to establish mutual mistake were before the Court. The Court of Appeal also were of opinion that no amendment was required.

Pritt K.C. replied.

The House took time for consideration.

1931. Dec. 15. LORD BLANESBURGH. My Lords, I understand that my noble and learned friend Viscount Hailsham has read the judgment about to be delivered by my noble and learned friend Lord Warrington of Clyffe, and agrees with it. The views which I now proceed to express are my own.

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(1) L. R. 2 Q. B. 580, 588.

(2) [1903] 2 K. B. 740, 748–751.

(3) [1916] 2 A. C. 397, 403.

(4) [1919] A. C. 435, 455, 457.

This is an appeal by the defendants from an order of the Court of Appeal of November 17, 1930, which affirmed a judgment of Wright J. of the previous June 5, pronounced after the trial of the action before himself and a City of London special jury. By his judgment the learned judge, amongst other things, ordered that two several agreements—I propose to refer to them as the agreements of settlement—made on March 19, 1929, with each of the appellants by the respondents, Lever Brothers, Ld., should be set aside and that the moneys received under them should be repaid to Levers. The sum which the appellant, Mr. Bell, had thus to repay included premiums amounting to 1224*l*. 2*s*. 3*d*. on an endowment policy, later to be mentioned, which Levers had paid on his behalf. This sum was ordered to be repaid by Mr. Bell, on the assumption that the liability of Levers to pay it arose only on Mr. Bell's agreement of settlement, by the judgment set aside.

As I regard this case, its facts and the course of the litigation make a long story, even if, in detail, only those incidents are dwelt upon which have a bearing on issues still open.

In Niger Company, Ld., a company of large resources, with a paid-up capital of 4,750,000*l*. and issues of debenture stock aggregating 5,500,000*l*., Levers had as shareholders a controlling interest. They held in and after 1925 99.5 per cent. of the issued share capital. The business of Niger was to deal in West African products, including cocoa. It is with its cocoa business alone, extensive enough in itself, but only a fraction of its total activities, that this case is immediately concerned. For several years before 1923 Niger had been meeting with heavy losses, and Levers, for the protection of their then large investment in it, had themselves been financing or bearing these losses. Confronted in 1923 with the urgent problem of securing less unfavourable results, Levers approached the appellants with an invitation to undertake between them the reorganization and management of Niger.

At that time Mr. Bell was joint manager of one of the great London banks. He had had a long experience of banking, with some knowledge of trade on the West Coast. Mr. Snelling's selection was due to the fact that he was an accountant of exceptional ability, who had just rendered notable service to Levers in bringing about a favourable adjustment of Inland Revenue demands upon them.

Under Mr. Bell's engagement with his bank he was entitled on retirement after a few further years' service to substantial pension rights. As he would forfeit these if he were to leave the bank to take up other work, some substituted provision on this head, operative without reference to the duration of the new service, was for him of essential importance. It does not appear that any similar sacrifice was involved in Mr. Snelling's acceptance of the offer made him, and this difference of circumstance in the two cases is reflected in the final agreements reached. In the result, Levers' invitation being favourably entertained by both appellants, the conditions of their employment were in due course embodied in letters passing between Levers, or the late Lord Leverhulme on Levers' behalf, and the appellants respectively. These letters and the formal agreements referentially embodying their terms—separate agreements with each appellant—were to the following effect.

For Mr. Bell, Levers were to take out and pay all premiums upon an endowment policy on his life, but maturing at sixty or previous death, for an amount which on death before maturity would provide 16,200*l.*, and on maturity would provide 1500*l.* per annum or 16,200*l.* at his option. The policy was to belong to Mr. Bell and the premiums were to be paid by Levers, notwithstanding the termination of his engagement, unless it was terminated by himself. To this obligation on Levers' part, I must return later. As a continuing obligation it was overlooked in the Courts below. I pause now only to observe that Mr. Bell's secession from the service of his bank to undertake his new employment—an act at once complete—was the entire consideration for this particular promise on Levers' part, which stands out separate from the other provisions of the agreement.

For the rest Mr. Bell was to be appointed and maintained by Levers as chairman of Niger for five years from November 1, 1923, at a salary of 8000*l.* a year, during which time he was to devote the whole of his time and attention during business hours "to the business" of Levers. Thus was it expressed in the formal agreement of August 9, 1923. As to Mr. Snelling, he was to serve "in regard to the West African interests" of Levers (note the phrase) for five years from October 1, 1923, at a salary of 10,000*l.* per annum to March 31, 1925, and of 6000*l.* per annum for the rest of the term. There was in the formal agreement with him the same provision as to his time and attention that was contained in the agreement with Mr. Bell.

In July, 1926, by further agreements then entered into the service of the appellants was prolonged. The earlier contract with Mr. Bell was replaced by a fresh agreement for five years from July 1, 1926, at the same salary and insurance premium and with the addition of a commission in certain events which, however, did not in fact become either actual or prospective. Mr. Bell was to be chairman of Niger for the whole term.

The new agreement with Mr. Snelling was for the same extended period, at his same salary of 6000*l.* per annum, with the same commission as in Mr. Bell's case. Mr. Snelling was to be vice-chairman of Niger for the whole term.

On September 14, 1923, Niger had formally appointed both appellants to be directors of the company, and the appellant Bell to be its chairman. On April 8, 1924, Mr. Snelling was formally appointed by Niger vice-chairman of the company. From the autumn of 1923 until the end of April, 1929, when their service ceased under the agreements of settlement now in question, the joint management of the appellants continued through the exercise by them of the duties attached to these two offices and to the directorate of Niger's Associated Companies, to which also they were appointed. With reference to that joint management, it is convenient at once to observe that although in the letters of appointment it was to the "business" or to "the West African interests" of Levers that the appellants were respectively apparently to attend, yet from the beginning to the end of their engagement, as probably always intended, it was in the business of Niger that they were exclusively employed. It was by their appointment to the chairmanship and vice-chairmanship of Niger and to the directorate of its many associated companies with all attendant responsibilities that they were clothed with the necessary and only powers of management and control which they ever exercised or possessed.

The consequences flowing from all this are important. As will appear later, these were never fully appreciated at the trial, and the resultant confusion is only now clearly revealed before your Lordships' House. Although Lord Leverhulme, in one of his letters to Mr. Bell, did point out to him that he would be responsible for his actions to the shareholders of Niger, it is not plain that by them Lord Leverhulme meant more than Lever Brothers, Ld., for it is sufficiently clear from other indications that to his business mind "Levers' West African interests," "Levers' West African business," and the Niger Company, Ld., were practically convertible terms, notwithstanding the fact that the $\frac{1}{2}$ per cent. outstanding shares in Niger represented 23,750 shares of 1*l.* each held by 300 shareholders, and that 5,500,000*l.* debenture stock of that company was outstanding in the hands of the public. And this view, natural enough perhaps to a layman of Lord Leverhulme's realism, remained with less justification persistent up to the close of the plaintiffs' case at the first hearing of this action. Until then Levers were the only plaintiffs, the theory still apparently being that Niger was so subordinate to them that to a suit which in large measure was for the vindication of its own proprietary rights it was not even necessary to make it a party. The addition of Niger as plaintiff made after the first hearing corrected, formally, this misconception. But it never entirely disappeared. Levers' West African interests, although there were none in question which were not the property of Niger, was a description that survived even at your Lordships' Bar, while the appellants both in the summing-up and in the questions put to the jury were represented as servants, serving two masters, Levers and Niger, a position as impossible to-day as ever it was.

How serious in its present consequences that confusion has proved will emerge in the sequel. At this stage it suffices to observe that if regard is had, as is of course, to the essential separation in personality between Levers and Niger, to say nothing of their possible divergence in interest from time to time, the relation in which the appellants ultimately stood to these two companies respectively is not, as I think, in any way doubtful. By Levers' agreements with them, Levers were bound to maintain the appellants in their respective offices in Niger for the prescribed term at the prescribed remuneration. The appellants in return agreed with Levers, but with Levers only, to devote the whole of their business hours and abilities to the discharge of their assigned duties. As between the appellants and Niger it was in that company's articles of association that their terms of service were to be found: *Swabey* v. *Port Darwin Gold Mining Co.* (1), and it was by the general law as modified by any provisions of these articles that their responsibilities and liabilities to Niger in respect of any actions of their own would fall to be ascertained: *Costa Rica Ry. Co.* v. *Forwood.* (2)

As a result there remained no contract by the appellants to serve Levers in a post from which Levers could "dismiss" them. Nor is "dismissal" the term by which their expulsion from office by, or their cessation of office in, Niger would properly be described. So far as Levers were concerned they were as the result of their agreement bound to maintain the appellants in office so long only as they fulfilled their prescribed duties as officers of Niger, devoting the whole of their business hours to the discharge of these duties. So soon as they defaulted in these respects Levers would be justified in stopping any further payments to them, and would be relieved from the obligation of further maintaining them in their offices. But that would be all. For results more drastic Levers had to rely only on their voting power as shareholders of Niger. And, so far as Niger was concerned, its powers, never powers of "dismissal," were in no way dependent upon any breach of duty by the appellants. The Niger shareholders as such could at any time effectively remove the appellants by special resolution (see art. 46 (2.)), even if, in the discharge of every duty they owed to that company, their actions had been beyond reproach or even criticism.

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(1) (1889) 1 Meg. 385.

(2) [1901] 1 Ch. 746, 757.

And now to resume the narrative. From July, 1925, the appellants' remuneration fixed by their agreements with Levers was paid to them by Niger direct, and such was the success of their management that the unsatisfactory position of Niger to which they had succeeded in 1923 was transformed into a state of great prosperity. "Every one agrees," said Wright J., speaking of the appellants in his summing-up of the case to the jury at the trial, "that their conduct and their work for their company [was] most efficient, devoted, strenuous and successful."

And here reference must be made to a matter which, although only incidental, will be found finally to colour the whole case of the appellants. On the coast, during the appellants' management of Niger, there were three other concerns trading in cocoa—the African and Eastern Trade Corporation, Ld., the Anglo-Guinea Produce Company, Ld., and Frame & Co., Ld. In 1925 and 1926 two agreements were come to between these four companies. They are referred to in the proceedings as the pool agreements, and they were entered into for the purpose of protecting the trade of the companies in buying and selling cocoa. By them provision was made for fixing by a committee a pool buying price and a pool selling price of cocoa, and each company was required timeously to notify to the others and to the pool committee the quantities and prices of cocoa purchased or sold by it, while, for subsequent division amongst the four constituents

H. L. (E.)

1931

BELL
v.
LEVER
BROTHERS,
LD.

Lord Blanesburgh.

according to prescribed percentages, payment was to be made, first of a "pool tax" on all purchases of cocoa by each of them, and secondly, of any excess sum over a prescribed amount received on sales by any of them. It is not however, the precise terms of these agreements which are now directly relevant: their immediate bearing upon the case arises from a clause contained in each agreement which seeks to associate the directors of every constituent company in the obligations thereby undertaken by that company. The clause in the earlier pool agreement is not a little confused. The clause in the later agreement is, however, free from ambiguity. It is the clause immediately relevant and it provides that "any reference to any company party thereto shall, where the context so admits, include its directors for the time being . . . . and that each party undertakes that its directors . . . . shall be bound by the terms of the agreement, so far as respects their respective dealings in cocoa (if any), and that all such dealings shall for all purposes be deemed to be acts of such party thereto done under the terms of the agreement and to be accounted for accordingly."

These pool agreements were, of course, well known to the appellants. Indeed, they were the result of negotiations in which one or both of them took part. The first agreement was signed on behalf of Niger by Mr. Snelling; the second by Mr. Bell. Mr. Snelling was a member of the pool committee, and from time to time attended its meetings. But both appellants said quite definitely and positively that actual knowledge of the existence of what may be called the directors' clause they never had, and that until shortly before the institution of this action and some months after the execution of the agreements of settlement they had no idea that, as a result of any operations of their own, Niger could be involved in any liability whatever to the pool. And I can myself have no doubt that the jury accepted as reliable the evidence of the appellants on this point. It is clear from the answers given by them to the series of questions addressed to them by the learned judge at the trial that they regarded the appellants as witnesses of truth. A perusal of the record shows how invariably the jury in these answers had accepted the appellants' recollection when it was in conflict with that of other witnesses. On this present point there was no conflict. From its very nature it was a subject upon which the appellants alone could depose. And their statements are not difficult of acceptance when the agreements themselves and the situation therein of the clauses in question are examined.

And the acceptance of this statement made by both appellants becomes of importance at different stages in the case, and not least when your Lordships approach, as now you must, the task of ascertaining precisely the nature and implications of the transactions of the appellants by which the payments setting aside the agreements of settlement are sought to be justified. It will be convenient to refer to these as the offending transactions. Four in number, they all took place in the short interval between November 4, 1927, and December 14 following. They were transactions in cocoa differences on the appellants' own behalf. They were carried through on the market by Niger's usual brokers on the instructions of the appellants or one of them and, as the jury must clearly be taken to have found, to the knowledge of these brokers that they were the appellants' own transactions. Three of them were more or less unprofitable. One only was successful, and the net result of the four was a profit of 1360*l*. In January, 1928, the transactions were closed and the profit was received from the brokers. And that was the end. Nothing else of the kind happened before or afterwards. None of the transactions in fact caused any damage to Niger, still less to Levers. No use was made by the appellants in the course of them, either of Niger's property, or of any information obtained by them as directors of Niger. Such must be the description of the offending transactions according to the findings of the jury who, on this subject also, clearly accepted the evidence of the appellants as the evidence of truth.

To this description, however, two things must be added. The first, that these transactions, although the appellants were ignorant of the fact, involved a breach of the directors' clause of the pool agreement for which—if these agreements were not invalid as being in restraint of trade—Niger might be made responsible to the other companies parties thereto.

And the second, that, although in the end regarded by the jury in the light most favourable to the appellants, these transactions remained at the best ill-advised. They had to be executed secretly, and to be described by separate letters lest in the market they should be supposed to be the transactions of Niger. And they were so conducted that they might not be generally known in the office of Niger itself. Such a procedure when it is discovered inevitably arouses suspicion. No transaction of a director open to the least suggestion of association with his company can ever hope to escape censure or even condemnation if it has been carried out in secret. In this instance once again, as so often before, it was the secrecy from Levers practised by the appellants that brought down upon them the charges of dishonesty from which they have only succeeded in escaping after a sixteen days' hearing before a judge and jury.

For, of course, the allegations put forward by the respondents with reference to these transactions made of them something very different from the same transactions as found by the jury. Most grave were the charges of fraud levelled against the appellants in respect of them. That, however, is another story which will find its place at a later stage of the narrative.

As has been said, the cocoa business of Niger was little more than a fraction of its total activities, and in amount the offending transactions were as small a fraction of Niger's current cocoa business. To these considerations, coupled with the view of them taken by the jury, may be attributable the conclusion also found that these transactions did not even remain in the minds of the appellants when the agreements of settlement were being made. They were, it must be emphasized, not known in any way to Levers until after these agreements had been completed.

The actual retirement of the appellants from the Niger service had no connection with the offending transactions.

The necessity for it came about in quite a different way. Niger's principal competitor on the coast had always been the African and Eastern Trade Corporation already mentioned. Amalgamation of the two concerns had in the years prior to 1929 been the subject of negotiation on a basis of Niger having one-fourth or at best one-third interest in the combine. But by 1929 the position of Niger had so greatly improved both absolutely and relatively that in that year the amalgamation negotiations were revived on what has been called a fifty-fifty basis. And it is apparent on the record that the higher participation meant for Niger an increase of many hundreds of thousands of pounds in money's worth, the credit for which is not denied to the appellants. The negotiations for this amalgamation were long and delicate. Mr. Snelling was on the coast while they were proceeding, but Mr. Bell rendered valuable services in bringing them to a successful conclusion—services handsomely acknowledged at the time by Mr. D'Arcy Cooper of Levers, who explained to Mr. Bell that the way he had put his personal position aside throughout the negotiation had relieved him of a great deal of difficulty. (Record p. 383.) What Mr. Cooper meant was that Mr. Bell had not stood out for any position in the new company for himself, although he knew full well that, if neither he nor Mr. Snelling were to join that company, the scheme of amalgamation must necessarily involve their retirement altogether from Niger. For by the scheme the assets of both amalgamating companies were with certain reservations to be transferred to the new company, each of the old companies receiving in return equal holdings of fully paid shares in that company. And the transfer actually took effect on May 1, 1929; and as from its completion Niger became a mere holding company influencing by means of its voting power the policy and administration of United Africa, Ld., the new company, but with no outlet within its own constitution for the undivided energies of the appellants as its chairman and vice-chairman, respectively. All this was realized while the negotiations for amalgamation were still only in progress, and during that interval steps were taken by Mr. Cooper acting on behalf of Levers to bring about, after everything had been completed, the termination of the appellants' employment on some agreed terms of payment. And the ensuing negotiation conducted with the appellants separately resulted in the two agreements of settlement, both of which have been set aside by the orders under appeal.

The agreement of settlement come to with Mr. Bell is embodied in a letter from Mr. Cooper to him of March 19, 1929, in the following terms :—

" Dear Bell,—As promised at our interview to-day, I write to record the agreement then arrived at between us, viz., that on the provisional agreement for the amalgamation of the African and Eastern Trading Corporation and the Niger Company becoming effective as from the 1st May next you will on that date retire from the Boards of the Niger Company and its subsidiaries, including H. C. B. and its subsidiaries, and in consideration of your so doing Lever Brothers, Ld., will pay you as compensation for the termination of your agreement(s) and the consequent loss of office the sum of 30,000*l*. in full satisfaction and discharge of all claims and demands by you of every nature and kind and howsoever arising against Lever Brothers, Ld., the Niger Company, the H. C. B. and any company, person or firm associated with them or any of them either directly or indirectly.

With regard to the insurance premium payable on the policy on your life with the Yorkshire Insurance Company it was agreed that Lever Brothers will continue to pay such premium until the policy matures.

Will you please let me have your reply confirming the above arrangement.

I should like to be allowed to say how deeply the Board of Messrs. Lever Brothers appreciate the work that you have done for the Niger Company during the period that you have been in control.—Yours sincerely,

F. D'ARCY COOPER."

The agreement of settlement come to with Mr. Snelling was on lines similar to that reached with Mr. Bell.

Mr. Cooper's letter to him of even date recording its terms is, however, as interesting for its variations from that addressed to Mr. Bell as it is for its similarity thereto. It is as follows :—

"March 19, 1929.

"Dear Snelling,—As promised at our interview to-day, I write to record the agreement then arrived at between us, viz., that on the provisional agreement for the amalgamation of the African and Eastern Trade Corporation and the Niger Company becoming effective as from 1st May next you will on that date retire from the Boards of the Niger Company and its subsidiaries including the H. C. B. and its subsidiaries and in consideration of your so doing Lever Brothers, Ld., will pay you the sum of 20,000*l*. in full satisfaction and discharge of all claims and demands by you under your agreement of employment or in any other capacity whatsoever and whether in respect of salary, commission, bonus, expenses, compensation for loss of office or otherwise.

Will you please let me have your reply confirming the above arrangement.

I should like to be allowed to say how deeply the Board appreciate the work that you have done for the Niger Company during the period that you have been in control.—Yours sincerely, F. D'ARCY COOPER."

In due course confirmatory letters were written and the agreements were duly carried out. The appellants received their remuneration and continued in active discharge of their duties until April 30 following. They then formally resigned all their directorships, as required by the agreements, and received from Levers the compensation arranged.

My Lords, while it is fully accepted that the offending transactions were entirely unknown to and unsuspected by Mr. Cooper when the negotiations were proceeding, there was a serious difference of recollection between Mr. Cooper and Mr. Bell on the question whether Mr. Bell did not, in order to justify a large payment to himself, expressly say in the course of the negotiations that he had faithfully and honestly served Niger during his association with that company.

Mr. Bell was certain that he made no such statement in any such connection, and the jury it is clear accepted his recollection and, as will be seen later, exonerated him from the charge of fraudulent misrepresentation based upon the allegation that the statement was his.

With regard to these agreements of settlement there is one matter which may be conveniently dealt with while the agreements themselves are immediately in view. It is affirmed by the respondents, with reference to them, and the acceptance of the allegation is implicit in the judgments appealed from, that the sole consideration moving from Levers for their agreement to pay Mr. Bell 30,000*l.* and Mr. Snelling 20,000*l.* was the satisfaction of what Levers, still in ignorance of the offending transactions, supposed were their respective salary rights under enforceable agreements of service with two years and two months of the term in each case unexpired. The suggestion touches an issue of primary importance in the final decision of this appeal. It is, I think, demonstrably incorrect. Although it is true that in the letter to Mr. Snelling commission is actually mentioned, I do not find on an examination of the record that the prospect of any commission being receivable by either appellant was ever of substance, and I feel satisfied that it in no way entered into the adjustment of figures. On the basis of salary to be lost, therefore, the maximum figure in prospect for Mr. Bell was 17,333*l.* 6*s.* 8*d.* and for Mr. Snelling 13,000*l.* But these sums could not have been recovered even in actions for wrongful dismissal, because allowance must in each case have been made for the fact that the whole sum was being immediately paid and for the further fact that each appellant was being released from his obligation of continued service and was being left free to seek other remunerative employment. And this employment, in the case of Mr. Snelling at all events—Mr. Bell, it seems, proposed to return to his farm—was likely to be immediate and on terms perhaps little less favourable than those attached to the post of which he was being deprived. Accordingly even these maxima must on this basis have been subject to serious reduction. Moreover that this sole consideration did not instruct the amounts paid is confirmed when it is found that these sums were not on that footing proportionate (as seems erroneously to have been supposed in the course of the trial. See Record, p. 437). If 20,000*l*. was on this footing the sum claimable by Mr. Snelling, 26,666*l*. 13*s*. 4*d*. only should have been awarded to Mr. Bell. If Mr. Bell's payment of 30,000*l*. was the standard, Mr. Snelling should have received not 20,000*l*. but 22,500*l*.

And this line of reasoning might easily be further pursued, with the result of making it, as I think, clear that, while undoubtedly the claim for unearned salary amounting at the remote outside in one case to over 17,000*l*. and in the other to 13,000*l*. was a material consideration for the payments agreed to, it was neither on the terms of either letter nor in fact the sole inducing cause. Into that inducement there undoubtedly entered the desire tangibly to recognize the exceptional services rendered to Niger by each appellant acknowledged in each letter and even now affirmed: still more perhaps to enlist their support of the amalgamation and to have their assistance in carrying it through in all its details to completion: above all, to secure on May 1 following, the voluntary resignation by each appellant of all his offices, results of value, it may have been of infinite value, to the prospects of a delicate negotiation in the success of which millions of pounds were involved. And these last two results could not have been secured if Levers, instead of writing through Mr. Cooper the letters of March 19, 1929, had, with the real offending transactions then disclosed to them, repudiated all further obligations under their agreements with the appellants, and as shareholders in Niger had sought, in spite of the appellants' opposition—quite effective for a sufficiently long period—to remove them from office. The vital significance of this conclusion, even so far as it can be reached on existing materials and apart from amplification resulting from further investigation, will presently appear.

Some two months later, as a result of inquiries made of the appellants with reference to certain cocoa transactions of Niger, of which complaint in arbitration proceedings was being made by other members of the pool, the offending transactions were brought back to the minds of the appellants, and for the first time, as they asserted, they became aware of the directors' clause in the pool agreements. Mr. Bell thereupon informed Mr. Cooper of the facts relating to the offending transactions in terms which in effect were those ultimately found by the jury as above stated. There was immense controversy at the trial as to the details of this conversation with Mr. Cooper, but it does not seem necessary to go more deeply into that matter now, for Levers did not and would not accept from Mr. Bell any innocent explanation of transactions, in their view highly improper, which until that moment had been completely concealed from them. And on August 7, 1929, they issued their writ in this action with themselves alone as plaintiffs, and the appellants as defendants. The allegations made by the points of claim were to the effect that the appellants were the servants of Levers; that it was their duty to serve Levers faithfully and honestly and not to act in any way prejudicial to the interests of Levers; that the offending transactions constituted such misconduct on the part of the appellants as to entitle Levers instantly to terminate the service agreements with them and to dismiss them without notice, and that had Levers known of the offending transactions they would have in fact dismissed the appellants; alternatively it was alleged that the appellants had wrongfully conspired to make secret profits for themselves and that the agreements of settlement were obtained by them respectively, "falsely and fraudulently concealing from [Levers] that they and each of them had [entered into the offending transactions] and also by falsely and fraudulently verbally representing to [Levers] that they had faithfully and honestly served Levers and/or Niger."

Para. 26 of the points of claim was as follows: "Alternatively the said agreements (i.e., the agreements of settlement) and each of them were made and the moneys paid thereunder were paid under a mistake of fact."

Particulars being asked for of the "mistake," it was stated to be "that the defendants and each of them had acted honestly in their conduct of the affairs of the Niger Co., Ld., and had not dealt in cocoa on their own account and/or in so dealing on their own account had not acted contrary to their duty and/or the terms of their respective contracts."

The relief claimed was damages for conspiracy and/or fraudulent concealment, breach of duty and breach of contract; rescission of the agreements of settlement; an account of all transactions and dealings in cocoa entered into by the appellants, and payment by them of the amounts found due on the taking of such account.

Objections on the lines which I have already indicated might very effectively have been taken to the whole scheme of the action and, in particular, to the relief claimed by Levers for themselves in respect of the offending transactions in a suit to which Niger was not even a party. But none such were in terms taken. Indeed, from the moment when the directors' clause of the pooling agreement was brought to the notice of the appellants, they refrained from any justification of the offending transactions as such and were ready to account for all the profit they had made by them. "If I had known that [the directors' clause] existed I would not have defended even at the time any of the transactions that I did," was one of Mr. Snelling's answers in cross-examination; and in accord with this attitude the 1360*l.* profit from these transactions had in January, 1930, been duly tendered to Niger by the appellants, and had been refused.

The action as so framed came on for trial before Wright J. and a special jury on March 26, 1930, and it was opened and evidence was called to prove a case of fraudulent misrepresentation and concealment only. Nothing at all was said about such things as mistake, or duty to disclose or fiduciary relation or uberrima fides. On the fourth day of the hearing Levers closed their evidence, and, following, as they stated, information derived from an examination of the brokers' books, they applied for leave to amend their points of claim in order to raise against the appellants further charges of fraud, the nature of which they foreshadowed. The trial had become one of wide public interest, and so soon as these new charges—all of them of the gravest description—were stated in open Court, the appellants, in the interests of their own reputations felt, as they said, that they must be met. Accordingly with no discussion except as to terms, leave to amend, on stringent conditions, was given to Levers and the hearing, on the amended pleadings, was adjourned until May 13, to be then heard by the learned judge with a new jury. During the interval the opportunity was taken to add Niger as a co-plaintiff, with the appropriation to Niger of the relief appertaining to the offending transactions. It was apparently taken for granted when Niger was so added that its rights in the matter had not as a part of its undertaking passed to United Africa on the amalgamation. Perhaps they did not. Niger's title to sue has not been challenged any more than has Levers'; although if Levers did, quite justifiably, charge against Niger the compensation paid under the agreements of settlement, as they were charging against Niger the remuneration of the appellants represented by a part of it, even the right to claim rescission of the agreements of settlement may also have passed to United Africa as part of Niger's undertaking. But this objection has not been taken. Levers, who made the compensation payments in the first instance, may have been content as between themselves and Niger to bear them finally, and for other reasons there may be nothing in the point. Accordingly I pass on.

A perusal of the other voluminous amendments shows that the sting of them lay in the new allegation that the offending transactions were all of them in their origin the transactions of Niger itself, subsequently appropriated to themselves by the appellants through the innocent agency of the company's brokers after it had become clear to the appellants that the transactions would be profitable. Para. 26 of the original points of claim remain unaltered. And still no case of duty to disclose or of fiduciary relation or of uberrima fides was made by the amended pleading.

My Lords, the respondents took upon themselves a very grave responsibility in launching at that stage against men who in all other respects had deserved well of them these charges so grave as to be almost criminal in character. I do not doubt that the respondents acted in good faith in making them. But, although persisted in to the end of the long hearing, the charges entirely failed, and the appellants are entitled at the least to have that failure remembered on any application by the respondents for further indulgence in this action whether by way of amendment of pleadings or otherwise.

The matters dealt with in the evidence will in the main be found reproduced in the questions left by the learned judge to the jury at its close. To these questions reference has already been made. With the answers given by the jury to each, I now record them:—

1. Did the defendant Bell and/or the defendant Snelling fraudulently misrepresent to the plaintiffs Levers that they had faithfully and honestly served Levers and/or Niger with the object and effect of inducing Levers to make the agreements or either of them of March 19, 1929?

Jury's answer: No.

2. Did the defendant Bell and/or the defendant Snelling fraudulently conceal from Levers and/or Niger that they or either of them had had the dealings complained of with the object and effect of inducing Levers to make such agreements or either of them?

Jury's answer: No.

3. Did the defendants or either of them commit breaches of contract or duty towards the plaintiffs in:

(*a*) wrongfully appropriating as their own the contracts referred to as C. T. C., R. T. D., G. S. 2 [the "offending transactions"] or any of them being contracts of the Niger Company and appropriating to themselves the profits on such contracts?

Jury's answer: No.

(*b*) entering into the contracts referred to as C. T. C., R. T. D. and G. S. 2 or any of them as private transactions on their own account and for their own benefit?

Jury's answer: Yes.

(*c*) in wrongfully appropriating to their own use and benefit the sum of 1000*l*., being moneys of the Niger Company?

Jury's answer: No.

(*d*) If so, what damages, if any, under (*a*) or (*b*) or (*c*)?

Jury's answer: (*b*) 1360*l*. 5*l*. nominal damages.

4. (*a*) Were the plaintiffs Levers entitled to terminate the contract of service with the defendants or either of them:

(1.) in January, 1928?

Jury's answer: Yes.

and (2.) in March, 1929?

Jury's answer: Yes.

If so, would the plaintiffs Levers have elected to exercise such right at either of such dates?

Jury's answer: Yes.

(*b*) Were the plaintiffs, the Niger Company, entitled to dismiss the defendants or either of them from their positions as chairman and vice-chairman respectively:

(1.) in January, 1928?

Jury's answer: Yes.

(2.) in March, 1929?

Jury's answer: Yes.

If so, would the plaintiffs, the Niger Company, have elected to exercise such right at either of such dates?

Jury's answer: Yes.

5. When Levers entered into the agreements of March 19, 1929, did they know of the actings of either of the defendants in regard to the dealings C. T. C., R. T. D., G. S. 2?

Jury's answer: No.

If Levers had so known would they have made these agreements or either of them?

Jury's answer: No.

At the date of the respective interviews prior to these agreements, had the defendant Bell or the defendant Snelling in mind their actings in respect of these transactions?

Jury's answer: No.

Now, if these questions are carefully scrutinized it will be found that they are based on an acceptance by the learned judge of Levers' view as to the legal position of the parties towards each other under the service agreements. The undue prominence thus conceded to Levers served further to divert attention from the true position, never at any time accentuated, that the claims against the appellants in relation to the offending transactions were claims of Niger only, and that the validity and extent of these claims depended mainly if not exclusively upon the regulations of Niger. It is remarkable that so far as appears on the record these regulations were only once mentioned—and then in the most casual way—during the whole of the proceedings. In the summing-up they were never referred to at all. It will be noted also that no question was asked upon the issue of conspiracy—that because the learned judge held that there was no evidence to support it. Lastly, with regard to the allegation that the appellants had in carrying out the offending transactions used the property of Niger or utilized information obtained by them as its directors, the question 3 (*c*) was directed to the one matter relevant thereto, which, as a result of the evidence, remained in doubt, and in respect of that remaining matter also, the jury, as will be seen, exonerated the appellants.

The fifth of the questions was drawn up by the learned judge, after counsel had addressed the jury, but before the summing-up. It was in the Court of Appeal suggested that the question was directed to an issue of mutual mistake, and that the appellants' counsel should have thus regarded it. I confess that I cannot blame him if he did not. Put at the end of a long hearing dealing only with grave charges of fraud and in the course of which no such issue had been even remotely hinted at, I should myself have thought, as I gather the appellants' counsel did think, that it was directed to the issue of fraudulent concealment, an issue which had throughout bulked prominently in the proceedings.

It was agreed that the learned judge was to be entitled to draw necessary inferences of fact upon any question that might arise which had not been put to the jury, and in the discussion upon the findings and the pleaded case which took place on a later day, counsel for the respondents, after claiming that Levers were entitled to rescission of the agreements of settlement on the ground of unilateral mistake, ended by propounding the view that they were so entitled also on the ground of mutual mistake, that issue as they contended having been raised by para. 26 of the points of claim, and found in their favour by the jury in their answers to questions 4 (*a*) and 5. The learned judge, after argument, and holding, as it seems, that the issue was sufficiently raised by para. 26—for he had previously intimated (Record, p. 1437) that he would allow no question to be put to the jury which involved any amendment of the pleadings—finally held that the agreements of settlement must be set aside on the ground of mutual mistake, and he ordered the moneys paid thereunder, including the premiums on Mr. Bell's policy paid by Levers on his behalf, to be repaid. The learned judge held that all the parties to the agreements of settlement entered into them under the common mistake that the contracts of service were binding, in the sense that they could not at that moment have been got rid of without the appellants' consent.

It is, I believe, the view of all your Lordships that the order of the learned judge in so far as it directed the repayment by Mr. Bell of the premiums referred to cannot stand. Wright J. overlooked the fact that, even with the agreements for settlement set aside, the liability for payment of these premiums would still remain on Levers under the original agreement of 1923 because, apart from Mr. Bell's agreement in that behalf in the rescinded agreement of settlement, there had been no termination of his engagement by himself. This point was discussed at your Lordships' Bar, and the respondents offered no objection to its being taken into consideration by the House. Accordingly, in that respect at least, the order of the learned judge must now be corrected. But that is relatively a small matter. The greater questions involved remain.

The appellants appealed to the Court of Appeal. On November 17, 1930, their appeal was dismissed. The Lords

Justices took the same view on mutual mistake as the learned judge had done. They also took the point and held that, although in no way pleaded, his judgment could be supported on the ground that the appellants during the negotiation with Levers for the agreements for settlement were under a duty to disclose their offending transactions of fifteen months before; and that they were not excused from disclosure by reason of the fact that, as the jury had found, these transactions had passed from their minds. Upon the question of amendment Scrutton and Lawrence L.JJ. were of opinion that the issue of mutual mistake had not been pleaded, but, differing in that respect from the learned judge's view, which seems to have been overlooked, they saw no sufficient reason why the pleadings should not be treated as amended so that the issue might be decided on existing materials. In Lawrence L.J.'s view, the objection of the appellants' counsel to that course being taken was "technical" and "devoid of merit." Greer L.J. held that the issue of mutual mistake was sufficiently raised by para. 26 of the points of claim.

From this the appellants appeal again to your Lordships' House, and upon that appeal, and for the purpose, as I assume, of obtaining a decision upon any issue open upon the pleadings, both parties accepted the jury's findings as correct. Upon this three questions at once arise: (1.) Is this issue of mutual mistake open to the respondents upon the pleadings; (2.) if not, is this action one in which without injustice to the appellants the necessary amendments to raise it could after verdict and on the application of the respondents have been allowed by the learned judge? May these even now on a like application be allowed by this House; and (3.) if such amendments be allowed, are the respondents entitled to judgment upon the issue raised by them? I propose to deal with each of these questions in their order, I regard them as being in this case of the first importance, and I have been careful in what has preceded to state with particularity facts germane to their proper consideration.

As to the first of them, I believe that all of your Lordships are of opinion that this case of mistake is not open to the respondents on the pleadings as they stand. I think no other view is tenable. In its setting, as well as according to its terms, para. 26 to me seems quite unambiguous. The case pleaded by the respondents was on the face of it and from beginning to end a case of deliberate fraud on the part of the appellants. The points of claim, at great risk to the respondents in the matter of costs, were amended, only that the fraud charged might be more flagrant in character. Para. 26 remained unaltered. Even without the particulars of the mistake alleged, I should not have thought that its meaning or intent was doubtful. With the assistance of the particulars its meaning becomes, I think, abundantly clear. That it is the state of mind of Levers which is alone being therein described is, surely, shown by the fact that the moneys are only alleged to have been " paid " under mistake. There is no allegation at all that the moneys were " received " under the same mistake. And the particulars appear to me conclusively to show that no such allegation was intended to be made. Further para. 26, if limited to unilateral mistake induced by the appellants' fraud is, even although alternative, consistent with all that precedes, but mutual mistake, innocent on the part of the appellants, is so entirely destructive of everything previously alleged against them that no interpretation of para. 26 involving an assumption of honesty on their part could, in the absence of the clearest words, properly be placed upon it. Finally the claim made by the heads of claim is for rescission of the agreements of settlement, relief properly consequent upon a case of voidability either for fraud or unilateral mistake induced by fraud. But if the allegation, even alternative, was that the agreements were entered into under mutual mistake of fact, then these agreements were not voidable but void ab initio, and no order on that footing is even hinted at in the relief sought. The truth is that the respondents having decided to charge fraud against the appellants did so up to the hilt. There is no weakening in this respect in para. 26. Accordingly I am of opinion that the case on which the respondents have succeeded in the Courts below was not open to them on the pleadings as they stand. It is clear also, as I have said, that so far as the learned judge was concerned he only entertained that case because of his view, which all your Lordships consider erroneous, that no amendment was called for.

This circumstance makes the second of the above questions of the gravest importance. Are your Lordships in the Court of last resort to grant an amendment which the learned trial judge himself would have refused? It is convenient to set forth here the amendment which the respondents formulated and asked for, if amendment was held to be required.

It was as follows:—

"Para. 26 (*a*): Further and in the alternative the said agreements and each of them were made under a mutual mistake of fact, and the moneys paid and received thereunder were paid and received under a mistake of fact.

Particulars.

The plaintiffs Levers and the defendants and each of them were under a mutual mistake fundamental to the said agreements that the said contracts of service and each of them existed as binding obligations upon the said plaintiffs and the defendants respectively and that the said contracts respectively could not be terminated without the assent of the defendants respectively.

Further or in the alternative the plaintiffs Levers will rely upon the particulars set out under para. 26 hereof."

Now there are, of course, no limits to the power of your Lordships' House to permit, in proper circumstances, almost any amendment. Nevertheless, the power is not one for arbitrary exercise, and I propose in dealing with the propriety or otherwise of its exercise now to govern myself by two authoritative statements of relevant principle, one by Lord Watson and the other by Sir Herbert Cozens-Hardy M.R. My first and second reasons for concluding that leave to amend should in this case be refused are based upon

Lord Watson's observations in the *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), where the respondent had complained that the case which was being maintained against him before the Judicial Committee was not within the appellants' declaration: that the evidence led at the trial had not been directed to that new case, which ought not to be entertained. Upon that contention Lord Watson, delivering the judgment of the Board, said: "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud as representing all the evidence which he could have brought forward in order to rebut a charge of negligence might be attended with the risk of doing injustice."

Except that in that instance the new case was one of negligence, whereas here the new case is one of innocent mistake, Lord Watson's observations seem to me to be entirely in point, and I base myself upon them as I proceed.

And my first reason for the conclusion that this amendment should not be allowed is this. It raises, as something quite new, and in an action hitherto based on fraud alone, an issue with all fraud eliminated. If the amendment were allowed, the appellants in the discussion of that new issue would find themselves faced with and bound by the answers of the jury to the fourth question. But, on examination of the learned judge's summing up, it appears, as I think, quite clearly that these answers were given by the jury under a direction which, although it might have been allowed to pass as relatively harmless in a case based upon fraud, was one which, as applied to a case from which all fraud has been eliminated, cannot in point of law, as I think, be supported. It is not necessary to suggest—it may not be permissible for me even to speculate upon—what, under a proper direction, as applied to the new case, the answers of the jury to the question would, or should, have been. It is enough for present purposes, to say, as I do, that to allow the respondents to make this new case, with the appellants bound to accept these answers to the fourth question as they stand, would in my judgment expose them to a risk of injustice from which they are entitled to claim protection.

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(1) [1892] A. C. 473, 480.

The answers to that fourth question, of course, depend upon what was the true nature of the liability of the appellants to Niger resulting from the offending transactions *as found by the jury and as already described.* Did these transactions as thus ascertained involve on the part of the appellants a breach of their duty to Niger so serious as on their discovery by Levers fifteen months later to be sufficient to justify an immediate disclaimer of all further responsibility under the appellants' agreements of service? That is the question.

My Lords, I have already given my reasons for the view that in the fourth question the real relation between the parties is not properly appreciated. All this, however, is relatively unimportant here. Even the further direction of the learned judge, to which I am now about to refer, might have been allowed to pass, had the fraud referred to in question 3 (*c*) been found instead of being negatived. For with that fraud brought home to the appellants the action would have really been undefended. But that charge, like all the other charges of fraud, has disappeared, and the precise character in legal responsibility of the offending transactions stripped of fraud becomes of essential importance. And it was, I venture to think, quite misunderstood. The point

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Blanesburgh.

here to be noted is that these transactions involved no contract or engagement in which, either for profit or loss, Niger was at all concerned. The contracts were all contracts by which the appellants alone were bound for their own benefit or burden to some outside party exclusive of Niger altogether. And this distinction is vital: because the liability of a director in respect of profits made by him from a contract in which his company also is concerned is one thing: his liability, if any there be, in respect of his profits from a contract in which the company has no interest at all is quite another. In the first case, unless by the company's regulations the director is permitted, subject to or without conditions, to retain his profit, he must account for it to the company. In the second case, the company has no concern in his profit and cannot make him accountable for it unless it appears—this is the essential qualification—that in earning that profit he has made use either of the property of the company or of some confidential information which has come to him as a director of the company.

Now, unfortunately, the learned judge here, so far as his observations had precision, directed the jury as if the offending transactions were in the first class, and not, as was the fact, in the second, and he gave his direction without any reference at all to the regulations of Niger. The relevant duties of a director were laid down by him in terms of the following quotation which he read to the jury. Their duties were: "So to act as to promote the best interests of the company. No one having such duties to perform can be allowed to enter into engagements in which he has or can have a personal interest which conflicts or may possibly conflict with the interests of those whom he is bound to protect. No question is liable on such occasion to be raised as to the fairness or unfairness of the dealing. It may be impossible to demonstrate how far the interest of the company is affected. No inquiry on that subject is permitted."

Now, the learned judge did not give the source of his quotation, and I have not succeeded in tracing it. But both from its wording, and also from its close similarity to Lord Cranworth's *locus classicus* on the subject printed in the headnote to *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1), I can have little doubt that, like Lord Cranworth's statement, the quotation is concerned with a company's contracts in which, on the other side of the table, a director is interested, and with reference to which the company's regulations are silent. The quotation is not addressed to a director's own contracts with outsiders in which the company has no financial interest at all.

The regulations of Niger are illuminating with reference to both classes of contracts. Art. 47 concedes to its directors in very wide terms, and subject to exceptionally easy conditions, the privilege of being concerned in contracts with the company. And the article also clearly contemplates that a director may be a director of other companies and entitled to his privileges as such.

And this brings me to the position of a director in relation to contracts of the second class, with which we are here alone concerned. The principle will be found in the case usually cited in relation to it, although reported only in the Weekly Notes, of *London and Mashonaland Exploration Co.* v. *New Mashonaland Exploration Co.* (2), where it was held that, it not appearing from the regulations of the company that a director's services must be rendered to that company and to no other company, he was at liberty to become a director even of a rival company, and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company he could not at the instance of that company be restrained in his rival directorate. What he could do for a rival company, he could, of course, do for himself. And in the present case that principle is not affected by the agreements of each appellant with Levers to devote all his time during business hours to the Niger service. There is no corresponding provision in the regulations of Niger, and it was not because

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(1) (1854) 1 Macq. 461.

(2) [1891] W. N. 165.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Blanesburgh.

the offending instructions were instructed during the day and not in the evening that they are impugned. It was not suggested that the appellants were in any way precluded by virtue of their engagement from at any time entering into private speculations of their own in outside things as, e.g., stocks and shares. Indeed any such suggestion was expressly disclaimed by the respondents. Moreover, my Lords, the respondents did endeavour to establish that in relation to these transactions the appellants did make use of Niger's property, and information and question 3 (*c*) is directed to the only instance alleged which after the evidence remained open, and it was answered in the negative. Accordingly I reach the conclusion that, so far, the appellants in relation to the offending transactions were under no liability whatever to Niger.

But all this is apart from the pool agreement. There remains the question of the liability of the appellants to Niger by reason of the directors' clause in that agreement, and as to this, the appellants, in my judgment, were quite right in recognizing so soon as that clause was brought to their notice that they should not retain the profit they had made from these transactions.

From all this it follows that instead of the direction to the jury on this matter being what it was, that direction, on the supposition that the facts would be found as they have been, should, I think, have been to the effect that in the absence of any proof that the appellants in carrying out the offending transactions had utilized for their own purposes any property of Niger or any confidential information obtained by them as its directors, they were not, apart from the pool agreement, under liability to account in respect of these offending transactions to Niger, or to Levers, or at all. It was the directors' clause in the pool agreement alone which left the appellants under any liability in the matter, and it must be taken that the existence of that clause was unknown to them until some months after the agreements of settlement, and many months after the offending transactions. Nor should the renunciation of their profit by the appellants after knowledge of the clause be overlooked in the consideration of the question whether the offending transactions of the appellants would have justified more than a year after the event a repudiation by Levers of further liability under the contracts of service.

Upon the actual direction given it is not surprising that the jury found in reply to question 4 (*a*) that Levers, and in answer to 4 (*b*) that Niger, were respectively entitled to terminate the appellants' contracts of service not only in January, 1928, but also in March, 1929. What would be the answer to the proper questions of a jury directed on the lines just indicated ? I give no answer, save this, that it would in my judgment be unjust to the appellants to expose them to the hazard of this amendment bound by the answers to question 4 as they stand, for it cannot be affirmed that under a proper direction, applicable to the facts as found, that answer would be forthcoming. And it will not be forgotten that in its absence the whole issue of mutual mistake remains, as an issue, stillborn. Such, then, is my first reason for disallowing this amendment.

My second reason is that the appellants have not had the opportunity of showing by evidence the extent to which Levers received consideration for the settlement agreements over and above their release from liability for the further payments for which, on the hypothesis, it was by all parties assumed that they remained liable. The mistake must go to the whole consideration. I have already indicated the general nature of the further advantages derived by Levers from the settlement agreements, as these appear on the record, but this aspect of the case has not been developed in evidence, because in the action as fought it was not either relevant or necessary so to do. It may be, indeed I am far from saying that, even on the existing record, the appellants have not sufficient evidence on this point to displace the new plea altogether. But here again it would, I think, be unfair to leave them exposed to the hazard of the amendment with that answer to it quite undeveloped.

My third reason for disallowing the amendment is based on the principle enunciated by Cozens-Hardy M.R., which

I have already foreshadowed. It would be wrong, the Master of the Rolls said, in *Nocton* v. *Ashburton* (1), " to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based " in that instance also " upon negligence." The qualification of his statement made in this House, in the special circumstances of that case, in no way questioned its essential soundness, and further illustrations of its application will be found in *Halsey* v. *Brotherhood* (2) and *Noad* v. *Murrow*. (3)

In my judgment the principle applies here with compelling force. The first amendment made by the respondents charging further frauds against the appellants with their failure after a prolonged hearing to make any of them good, as I think, furnishes, when the services of the appellants to Niger are remembered, a convincing reason why this complete change of front after all else has failed should not be permitted to the respondents.

I cannot therefore hold with the view that the appellants' objections to this amendment are either technical or destitute of merit. On the contrary, the objections seem to me to be fundamental, and in the interests of fairness in litigation it is, I think, *optimi exempli*, that in such a case as this they should be sustained.

I am prepared, therefore, to allow this appeal on this head solely on the ground that no case other than their pleaded case is open to the respondents in this House, and mutual mistake has not been pleaded.

But, my Lords, if, contrary to my own notions of the fitness of things, the appellants, bound by the jury's answers to question 4, were to be put at risk by having this question of mutual mistake determined on an amended pleading upon existing materials, I should not wish it to be supposed that in my judgment the appellants would fail. On the contrary, they would, I think, even so handicapped, still succeed on that question. There I find myself in entire accord with the conclusions of my noble and learned friends Lord Atkin and Lord Thankerton, whose judgments I have had the advantage of reading. I refrain from adding to a deliverance already too long any further observations on the case so regarded or any further reasons in support of it. My noble friends begin where I am content to end. But I follow them also to their goal.

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(1) [1914] A. C. 932, 963.
(2) (1880) 43 L. T. 366, 370.
(3) (1879) 40 L. T. 100.

But I would add a word on the second ground relied upon by the Lords Justices in support of the learned judge's order—namely, that it could be upheld for the reason that Levers' unilateral mistake, which was certainly pleaded, resulted from a neglect on the part of the appellants of their duty, when negotiating the agreements of settlement, to disclose to Levers their offending transactions—a duty which was certainly not pleaded.

My Lords, I am in entire agreement with the answer given to this suggestion by my two noble friends opposite made on the assumption that Levers were the employers of the appellants and that the "offence" in their transactions had only temporarily passed from their minds.

But if the true position be, as I have I believe shown, that the appellants were not in any relevant sense the servants of Levers and that the only reason why their transactions were "offending" was that they involved Niger in a breach of the directors' clause of the pool agreement, of the existence of which the appellants were not merely forgetful but were in complete ignorance, what then, I would ask, remains of any duty on their part to disclose? My Lords, in that view of the situation the duty was I suggest plainly non-existent.

The action therefore, in my judgment, so far as it was contested, entirely fails.

My Lords, I confess that I arrive without reluctance at this conclusion of the whole matter. It appears to me to accord with a sound view both of justice and of fairness. I should have deemed it unfortunate if the appellants had been left in enjoyment of the profit accruing from the offending transactions and if they had not been required to pay the nominal damage which the jury considered these transactions occasioned to Niger. But that result has not followed. For

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Blanesburgh.

both the profit and the damage they remain accountable, as is wholesome.

Further acceptance, however, by your Lordships' House of the orders appealed from would have meant that, after the complete failure of the grave charges of fraud preferred against officials whose ability and services had brought to Niger advantages of untold value, these officials, the appellants, would have been left exposed to the same consequences as if the charges had all been true. Speaking only for myself I feel relieved to be able to take a view of equity and procedure which shields the appellants from such a consequence.

Nor is it to my mind unjust that, their profit accounted for, the appellants should be left in possession by way of return for their services of sums which, while they may seem bountiful to minds disciplined in a school of progressive austerity, would doubtless, by those engaged in great business, be regarded as no more than adequate to the occasion.

In the result it will be right that the order of the Court of Appeal should be discharged, with further consequential directions which will be given later.

LORD WARRINGTON OF CLYFFE (read by LORD THANKERTON). My Lords, this is an appeal by the appellants, Ernest Hyslop Bell and Walter Edward Snelling (the defendants in the action), from a unanimous judgment of the Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) dated November 17, 1930, affirming a judgment of Wright J. (dated June 5, 1930), pronounced upon the trial of the action before himself and a special jury of the City of London. By that judgment certain agreements made between the respondents (Lever Brothers, Ld.) and the two appellants respectively were declared void and were set aside, and the appellants respectively were ordered to repay to the respondents (Lever Brothers, Ld.) the sums of money paid to them thereunder.

The substantial question raised by the Appeal is whether in point of law upon certain findings of the jury, and upon such inferences of fact as could properly be drawn from those findings and the evidence, the two agreements were liable to be set aside on the ground of mutual mistake of fact affecting what is alleged by the respondents to be a fundamental assumption accepted on both sides as the basis on which the agreements were made.

A minor point of procedure was raised and decided against the appellants in both Courts—namely, whether having regard to the pleadings and the conduct of the trial it was open to the learned judge to decide the case on the point referred to above.

It is unnecessary for me to repeat the detailed statement of the facts already made; it is quite enough to give a short summary of them in order to explain the conclusions at which I have arrived.

In 1923 Lever Brothers, Ld., having very large interests in the Niger Company, Ld. (the respondents of that name), a company trading in cocoa and other produce on the West Coast of Africa, were desirous of obtaining the services of persons of experience and repute in the financial and commercial world to undertake and improve in their interests as shareholders the conduct of the affairs of the Niger Company, and with this object approached the two appellants. The result was the making of a service agreement with each of the appellants, that with the appellant Bell being dated August 9, 1923, at a salary of 8000*l.* per annum, and that with the appellant Snelling being dated October 9, 1923, at a salary of 6000*l.* per annum. Mr. Bell's agreement was for five years from October 1, and Mr. Snelling's was for five years from November 1, 1923. Each period was subsequently extended to five years from July 1, 1926. By each agreement the appellant concerned agreed to serve the Lever Company and to devote the whole of his time and attention during business hours to the business of the Lever Company. The sphere of his service was so far defined that in Mr. Bell's case he was to be appointed and maintained as chairman of the Niger Company during his service with the Lever Company. In Mr. Snelling's case no such specific agreement was made, but he as well as Mr. Bell was appointed a director of the Niger Company, and while Mr. Bell was appointed chairman of the Board, Mr. Snelling was appointed a vice-chairman. Each of them thus undertook direct obligations towards the Niger Company as well as those obligations towards the Lever Company which resulted from his service agreement. The salary of each was borne and paid by the Lever Company.

By two letters dated July 1, 1926, signed by Mr. D'Arcy Cooper on behalf of the Lever Company, and addressed in the one case to Mr. Bell and in the other to Mr. Snelling, the then existing service agreements were varied, first by extending the period of service as above mentioned, and secondly by giving to each of the two gentlemen a commission on the profits of the Niger Company as thereby defined in addition to his salary, which continued as before.

It is not disputed that the services of the two appellants in their several capacities were of great value to the Lever Company and to the Niger Company.

Early in the year 1929 certain arrangements for the amalgamation of the Niger Company and another company called the African and Eastern Trade Corporation were made, which on their becoming effective on May 1 in that year would involve the termination of the two service agreements before the period fixed for their continuance—namely, July 1, 1931.

Under these circumstances Mr. D'Arcy Cooper entered into negotiation with each of the two appellants for fixing the amount of compensation to be paid to them respectively for the premature termination of their employment by the Lever Company. These resulted in the two agreements the subject of this appeal.

By each of these agreements the appellant concerned agreed that on May 1, 1929, he would retire from the Boards of the Niger Company and its subsidiaries, and in consideration of his so doing the Lever Company would pay him as compensation for the termination of his agreement and the consequent loss of office, in the case of Mr. Bell the sum of 30,000*l.*, and in that of Mr. Snelling 20,000*l.*, in full satisfaction and discharge of all claims and demands by him of every nature and kind and howsoever arising against the Lever Company, the Niger Company, and other companies and persons therein mentioned. In Mr. Bell's case provision was made for the continued payment by the Lever Company of an insurance premium therein mentioned which will be referred to later on.

These agreements were duly carried into effect by the resignation by Mr. Bell and Mr. Snelling of their several offices and by payment to them respectively of the agreed compensation.

I now come to the circumstances giving rise to the present litigation.

Between November 4 and December 14, 1927, the two appellants entered on their own behalf into certain speculative transactions in cocoa referred to in the proceedings at the trial as contracts C. T. C., R. T. D. and G. S. 2. These transactions resulted in a net profit to the appellants of 1360*l.* The fact that these transactions had taken place was not disclosed to and was not known by any of the directors or officials of either the Niger Company or the Lever Company, except, of course, the appellants themselves, until after the conclusion of the agreements now in question, and the payment of the compensation payable thereunder.

In or about June, 1929, in the course of certain arbitration proceedings, the particulars of which it is unnecessary to state, the appellants, in answer to inquiries made on behalf of the Niger Company, disclosed the transactions above referred to and their result.

In answer to questions put to them by the learned judge the jury found that the appellants committed breaches of contract or duty towards the respondents by entering into the contracts above referred to as private transactions of their own and for their own benefit. The correctness of this finding is not disputed.

The present action was commenced by the Lever Company alone on August 9, 1929. By an amendment made on April 2, 1930, the Niger Company were added as co-plaintiffs.

As ultimately submitted for decision the case of the respondents contained charges of fraudulent misrepresentation and concealment by both appellants with the object and effect of inducing the Lever Company to make the agreements of March 19, 1929, charges of wrongfully appropriating as their own the contracts above mentioned being as alleged contracts of the Niger Company, and appropriating to themselves the profits on such contracts, and a charge of appropriating to their own use and benefit 1000*l.*, the moneys of the Niger Company. All these charges were negatived by the jury and their findings in this respect are accepted.

The points of claim after the allegations of fraudulent misrepresentation and concealment above mentioned contained the following clause: "26. Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact," and the plaintiffs claimed rescission of the two agreements of March 19, 1929, and repayment of the moneys paid thereunder, and a declaration that previously to the making of such agreements the plaintiffs were entitled to terminate the contracts of service and to dismiss the defendants without notice by reason of their alleged conduct.

The appellants admitted their liability to account to the Niger Company for the 1360*l.* the profits on the transactions above mentioned, and this sum was duly paid into Court.

Ultimately the case was decided against the appellants on the alternative point above referred to, the mistake there mentioned being treated as a mutual and not as a unilateral mistake.

The questions material to the issue of mistake as put to the jury and their answers thereto were as follows:—

3 (*b*). Did the defendants or either of them commit breaches of contract or duty towards the plaintiffs in entering into the contracts referred to as C. T. C., R. T. D., and G. S. 2 or any of them as private transactions on their own account and for their own benefit?

Answer: Yes.

4 (*a*). Were the plaintiffs (Levers) entitled to determine the contracts of service with the defendants or either of them ?

Answer : Yes.

(1.) In January, 1928.

Answer : Yes.

And (2.) in March, 1929. If so, would the plaintiffs (Levers) have elected to exercise such right at either of such dates ?

Answer : Yes.

(*b*) Similar questions and answers as to the position of the Niger Company in reference to the offices therein held by the defendants respectively.

5. When Levers entered into the agreements of March 19, 1929, did they know of the actings of either of the defendants in regard to the dealings C. T. C., R. T. D., G. S. 2 ?

Answer : No.

If Levers had so known would they have made these agreements or either of them ?

Answer : No.

At the date of the respective interviews prior to these agreements had the defendant Bell or the defendant Snelling in mind their actings in respect of these transactions ?

Answer : No.

The final question was put to the jury at the suggestion of the learned judge, and obviously is only relevant to the issue whether there was a mutual mistake. No objection to it was taken on the part of the appellants. Moreover, it is quite obvious that an argument founded on unilateral mistake had not the slightest chance of success, and it must have been clear to both parties that the learned judge was going to deal with the case as one of mutual as distinguished from unilateral mistake. I will assume for the present that either on the pleadings as rightly understood, or on the manner in which the case was conducted, or on the assumption that all the evidence reasonably likely to be forthcoming on the point was before the Court, the learned judge was entitled to deal with the matter on the footing of mutual mistake, and will consider the case of that footing.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Warrington
of Clyffe.

The learned judge thus describes the mistake invoked in this case as sufficient to justify a Court in saying that there was no true consent—namely, " Some mistake or misapprehension as to some facts . . . . which by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract they did." That a mistake of this nature common to both parties is, if proved, sufficient to render a contract void is, I think, established law.

I will refer to two cases only amongst several in which the principle was acted on. The first is one at common law—namely, *Strickland* v. *Turner*. (1) In that case a contract for sale of an annuity, under which the purchase money had been paid, was held to be void at law and the money was ordered to be repaid, on its being discovered that the person on whose life the annuity depended had without the knowledge of either party died before the date of the contract of sale. The parties were treated as having intended to contract on the basis of something of value actually existing, and as this proved not to have been the case the contract failed to be binding.

The other case (*Scott* v. *Coulson* (2)) is an example of the application of the same principle in a Court of equity. A contract for the sale of a policy was set aside on its being discovered that the assured was dead at its date, both parties being in ignorance of that fact. I cite this case for the sake of a passage in the judgment of Vaughan Williams L.J. He says : " If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into the contract on the basis of a common affirmative belief that the assured was alive ; but as it turned out that there was a common mistake, the contract was one which cannot be enforced. This is so at law ; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognized as the basis is not true."

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(1) 7 Ex. 208.

(2) [1903] 2 Ch. 249, 252.

This principle, however, is confined to cases in which "the mistake is as to the substance of the whole consideration, going, as it were, to the root of the matter"—(*Kennedy* v. *Panama, &c., Mail Co.* (1)—and does not apply where the mistake is only as to some point, a material point it may be, and even one which may have been the actuating motive of one of the parties, an error as to which does not affect the substance of the whole consideration.

Kennedy v. *Panama, &c., Mail Co.* (1) is a case in which it was held that the error relied on did not affect the substance of the consideration and the contract in question was accordingly enforced. The contract was one to take shares in a company. The prospectus on the faith of which the plaintiff had applied for shares contained a representation made in good faith that the company had obtained a valuable contract for the carriage of mails. The representation was intended to, and did in fact, induce the plaintiff to apply for shares. It was untrue, for, though at the time the application for shares was made and accepted there were reasonable grounds for expecting that such a contract would be obtained, it was never in fact concluded. It is to be observed that the error did not affect the shares themselves, the subject of the contract impeached; they were, notwithstanding the error, the very thing about which the parties were contracting. All that was affected were the prospects of the company earning profits available for payment of dividends. Accordingly the plaintiff's action brought for the purpose of setting aside the contract and obtaining repayment of his subscription was dismissed.

In *Smith* v. *Hughes* (2) the result was the same, but for a different reason—namely, that there was no sufficient finding that the mistake was mutual. It was alleged that the vendor was intending to sell and the purchaser intending to buy and believed he was buying old oats, whereas the actual parcel of oats, the subject of the contract, consisted of new oats. The purchasers' claim to be relieved of the contract failed, because the learned judge at the trial did not point out the necessity of finding not only that the purchaser believed the oats were old but that he also believed that the vendor was selling them as old.

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(1) L. R. 2 Q. B. 580, 588.

(2) L. R. 6 Q. B. 597.

This kind of difficulty does not arise in the present case. It is in my opinion clear that each party believed that the remunerative offices, compensation for the loss of which was the subject of the negotiations, were offices which could not be determined except by the consent of the holder thereof, and further believed that the other party was under the same belief and was treating on that footing.

The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements that the service contracts were undeterminable except by agreement was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made, or whether it was only a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration.

With the knowledge that I am differing from the majority of your Lordships, I am unable to arrive at any conclusion except that in this case the erroneous assumption was essential to the contract which without it would not have been made.

It is true that the error was not one as to the terms of the service agreements, but it was one which, having regard to the matter on which the parties were negotiating—namely, the terms on which the service agreements were to be prematurely determined and the compensation to be paid therefor, was in my opinion as fundamental to the bargain as any error one can imagine.

The compensation agreed to be paid was in each case the amount of the full salary for the two years and a half unexpired with the addition in Mr. Bell's case of 10,000*l.* and in Mr. Snelling's of 5000*l.* It is difficult to believe that the jury were otherwise than correct in their answer to the second branch of the group of questions numbered 5—namely, that had Levers known of the actings of the appellants in regard to the dealings in question they would not have made the agreements now impeached or either of them. It is true that such a finding is not in the strict sense one of fact, but it is an inference which the jury were entitled to draw from the evidence and from all the circumstances of the case, it is one which the learned judge and the Court of Appeal have also drawn, and, if I may say so with respect, it is one I should draw myself. I also agree with the learned judge that looking at the matter from the side of the appellants the existence of an agreement giving them rights which could only be compromised by compensation was in the same way the root and basis of the cancellation agreements.

In my opinion, therefore, assuming that the point was open, the appeal on the main question ought to be dismissed.

As to the question whether the point was open I agree that it is at least doubtful whether mutual mistake as to a fundamental fact was sufficiently pleaded either in the pleading itself or by the particulars subsequently given, but I have no hesitation in coming to the same conclusion as that arrived at by Scrutton and Lawrence L.JJ.—namely, that having regard to the proceedings at the trial effect ought not to be given to a technical objection such as that in question—no further evidence was in my opinion needed or could reasonably be expected to be forthcoming on the question, and no substantial prejudice has been sustained by the defendants.

But, while I think the appeal ought to be dismissed, there is one point which appears to have been overlooked at the trial and in reference to which in my judgment there should, if the appeal were dismissed, be a variation in the order.

The service agreement with Mr. Bell provided that Lord Leverhulme was to take out in the Atlas Assurance Company and Lever Brothers to pay all premiums on an endowment policy on Mr. Bell's life maturing at the age of sixty or previous death for an amount which would provide 1500*l.* per annum or 16,200*l.* at his option. This policy was to belong to him, the premiums being paid by Lever Brothers, notwithstanding the termination of his engagement unless the same should be terminated by him. The cancellation agreement preserved this obligation on the part of Lever Brothers, and if this is set aside the original agreement stands. I cannot think that the conduct of Mr. Bell amounts to a termination by him of the engagement within the meaning of the provision above mentioned, and if the judgment appealed from were to stand provision should be made for the continued payment by Lever Brothers of the premiums, and the repayment to Mr. Bell of any premiums paid by him.

I have purposely avoided dealing with the question whether the appellants were under an obligation as servants to disclose to Lever Brothers their breaches of the service agreements. In the view I take the question is immaterial. If such an obligation existed it would merely afford a further ground for the termination by Lever Brothers of the service agreements, for which such breaches themselves afforded a sufficient ground.

This case seems to me to raise a question as to the application of certain doctrines of common law, and I have therefore not thought it necessary to discuss or explain the special doctrines and practice of Courts of equity in reference to the rescission on the ground of mistake of contracts, conveyances and assignments of property and so forth, or to the refusal on the same ground to decree specific performance, though I think, in accordance with such doctrines and practice, the same result would follow.

LORD ATKIN. My Lords, this case involves a question of much importance in the formation and dissolution of contracts. The facts are not very complicated, though in the course of eliciting them the legal proceedings have undergone vicissitudes which have made the task of determining the issues more difficult than need be. In 1923 the Niger Company, Ld., was controlled by Lever Brothers, Ld., whom I shall call Levers, who held over 99 per cent. of its shares. The Niger Company dealt in West African produce, including cocoa, and at this time appears to have been making trading losses. To restore the position Levers approached the appellant Bell, who had banking experience, and the appellant Snelling, a chartered accountant, with a view to their taking part in the management of the Niger Company's affairs. In August, 1923, an agreement was made between Levers and Bell, under which Bell entered the service of Levers for a term of five years from November 1, 1923, on the terms of letters of August 8, 1923, which provided that Bell's salary was to be 8000*l.* a year. Levers were to pay the premiums on an endowment policy maturing at the age of sixty for a sum of 16,200*l.* Levers were to appoint and maintain Bell as chairman of the Niger Company during his service. Bell was only to be responsible to the Committee of Control of Lever Brothers and to the shareholders of the Niger Company. In October an agreement was made between Snelling and Levers whereby Snelling was to be in the service of the company for five years from October 1, 1923, on the terms of a letter of September 12, which provided that Snelling was to serve Levers in regard to its West African interests at a salary of 10,000*l.* per annum to March 31, 1925, and 6000*l.* for the remainder of the five years. On September 14 both Bell and Snelling were appointed by the Niger Company directors of the company, and Bell was appointed chairman of the Board. In April, 1924, Snelling was appointed a vice-chairman. The result of the appointments was a success. The Niger Company began to prosper and in July, 1926, the agreements of both Bell and Snelling with Levers were cancelled and new agreements substituted for a further period of five years from July 1, 1926, at the same salaries but with a commission on the profits of the Niger Company. The Niger Company continued to prosper, and in March, 1929, arrangements were concluded for an amalgamation between the Niger Company and its principal trade competitor, the African and Eastern Trade Corporation. The terms of the amalgamation appear to have left no room for Bell or Snelling. It was necessary, therefore, to dispose of the agreements between them and Levers. Mr. D'Arcy Cooper, the chairman of Levers, saw both gentlemen and

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

arranged terms with them which are recorded in two letters of March 19, 1929. The letter to Bell is as follows: [His Lordship read the letter set out in Lord Blanesburgh's opinion at p. 178.] The letter to Snelling is in similar terms except that the compensation given was 20,000*l.* Both sums were duly paid on May 1, 1929, on which date the two appellants retired from their service with Levers, and from the Boards of the Niger Company and various subsidiary companies to which they had been appointed. Very little attention appears to have been paid at the trial to these subsidiary companies, and there is a scarcity of evidence about them. The position in regard to them may demand further consideration; at present I leave them on one side. The position then is that in March, 1929, the two appellants left the service of Levers with substantial compensation in their pockets and mutual expressions of respect and esteem.

In July, 1929, Levers discovered facts which indicated that their expenditure of 50,000*l.* and their expressions of regard had been misplaced. For the years October to October, 1926–7, 1927–8, and 1928–9, the Niger Company, together with three of its trading competitors, including the African and Eastern Trade Corporation, had been parties to what were called "Pooling Agreements," under which the parties undertook to disclose to one another their dealings in Gold Coast cocoa; not to buy cocoa produced elsewhere without the consent of the Pool Committee; agreed to fix from time to time buying and selling prices and not to sell without consent below the agreed selling price; and made provision for distributing in agreed proportions the proceeds of the pool. It appears to have been considered necessary that the operations of the Niger Company under the pool should be carried out without excessive publicity; and the brokers' contracts for the Niger Company were recorded under initials. In November and December, 1927, the two appellants, at a time when the Pool Committee were lowering the pool purchase price of cocoa, on several occasions sold cocoa short, and closing in a few days at the reduced price made profits. A few days later they bought for the rise and made a small profit. Altogether the dealings resulted in a profit of 1360*l.* The transaction was of course conducted without the knowledge of Levers or any responsible official of the Niger Company. It was carried out in secrecy, and payment of the profit was made by the brokers at the appellants' request in a draft for American dollars. No defence can be offered for this piece of misconduct. The appellants were acting in a business in which their employers were concerned; their interests and their employers' conflicted; they were taking a secret advantage out of their employment, and committing a grave breach of duty both to Levers and to the Niger Company. The jury have found that had the facts been discovered during the service, Levers could and would have dismissed them, and no objection can be taken to this finding.

Having made this discovery it naturally occurred to Levers that instead of spending 50,000*l.* to cancel the two service agreements they might, if they had known the facts, have got rid of them for nothing. They therefore claimed the return of the money from the appellants, as well as the amount of the profits made; and on August 7, 1929, issued the writ in the present action, claiming damages for fraudulent misrepresentation and concealment, an account of the defendants' dealings in cocoa, and repayment of money paid under a mistake of fact.

The pleadings were in conformity with the endorsement on the writ. The defendants admitted the dealings in cocoa, alleging that they were speculative dealings in differences. They denied that they were wrongful but pleaded tender of the profit of 1360*l.*, which sum by an amended defence they paid into Court. It was not disputed in the Court of Appeal or before this House that the dealings were wrongful; and no question remains on this issue or as to the remedy ordered in respect of it.

The trial began on March 24, 1930, before Wright J. and a City of London special jury. On the fourth day on the conclusion of their evidence the plaintiffs sought and obtained

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

permission to amend their pleadings by alleging a series of fraudulent dealings in cocoa by the defendants involving misappropriation of the Niger Company's funds. At the same time for the first time the Niger Company were added as plaintiffs. The defendants were eventually acquitted of all the new charges. On May 5, 1930, the trial commenced anew before the same judge and a new jury. At the conclusion of the evidence there was some discussion as to the questions to be put to the jury. The Court adjourned for a day or two before the summing-up of the judge. There had been some discussion as to the issue raised by the plea of mistake, and when the case was resumed counsel for the plaintiffs suggested an additional question: "Did the plaintiffs in entering into the said agreements for the payment of and in paying the 30,000*l.* and 20,000*l.* respectively act in ignorance of the defendants' conduct (my Lord, that avoids the word mistake to which your Lordship took objection) and was such ignorance due to non-disclosure by the defendants of such conduct?" So far this seems to have been the only reference to the matter of mistake in the proposed questions. The learned judge said: "I have been thinking about that matter; probably yours is better; but what I thought of asking was this: 'When Levers entered into the agreement of 19th March, 1929, did they know of the actings of the defendants or either of them in regard to the dealing C. T. C., R. T. D. and G. S. 2. If Levers had known would they have made these agreements or either of them? At the date of the respective interviews prior to these agreements had the defendants or either of them in mind their actings in respect of these transactions?'"

To the last question Mr. Pritt for the defendants objected that there was no evidence that they had. Whereupon the judge said: "The point must really arise; that issue of fact will have to be dealt with by the jury when they are considering the question of fraudulent misrepresentation or fraudulent concealment. On the other hand the verdict of the jury on this point may have some bearing hereafter on the question of mistake."

The circumstances under which this last question was admitted are relevant to the complaint of the appellants as to the subsequent admission of any issue as to mutual mistake. They say that the only issue raised by the pleadings was as to a unilateral mistake by the plaintiffs; that the question propounded by the plaintiffs shows this; and that it cannot be assumed that the judge, while stating that the plaintiffs' questions might be better, but he preferred his own, should have asked a question for the purpose of solving an issue as to mutual mistake which was not upon the pleadings and upon which no witness had been examined or cross-examined and on which no word had been said to the jury by counsel on either side. At present it is unnecessary to say more on the topic.

The questions as finally left to the jury and their answers have been stated to the House and I need not repeat them. The judge heard argument as to how judgment should be entered. At some stage of the proceedings the parties had agreed that rescission of the agreements must be left to the judge, and that on any point left to him he must have leave to draw inferences of fact. Eventually the judge gave judgment for apparently both plaintiffs for 31,224*l.* against the defendant Bell and 20,000*l.* against the defendant Snelling, on the ground that "there was a total failure of consideration such as to vitiate the bargain" because "the parties dealt with one another under a mutual mistake as to their respective rights." On appeal this judgment was affirmed. The three Lords Justices accepted the view of Wright J. that there was a mutual mistake which entitled the plaintiffs to recover. They were also agreed that there was a duty upon the defendants to disclose to the plaintiffs their misconduct as to the cocoa dealings and that the contracts under which the money was paid were in consequence voidable.

Before the Court of Appeal and before this House the appellants contended that no issue as to mutual mistake had been raised by the pleadings, and that it was not open to the learned judge or to the Court of Appeal to determine the case without an amendment of the pleadings and upon an issue of fact which was not submitted to the jury. The Lords Justices appear to have held varying views on this point. Scrutton L.J. thought that the point was not pleaded, but that it was the practice of the Courts to deal with the legal result of pleaded facts, though the particular legal result is not pleaded except where to ascertain the validity of the legal result would require the investigation of new and disputed facts which had not been investigated at the trial. Here he thought that there were no such disputed facts, and the question could be dealt with without amendment. Lawrence L.J., on the assumption that mutual mistake was not pleaded, thought that all the facts relevant to mutual mistake had been fully investigated and ascertained at the trial: and that the objection was a mere technical objection without merits. Greer L.J. thought that mutual mistake was sufficiently pleaded.

I think it is sufficient to say for present purposes that it seems to me clear when the pleadings and particulars are examined that the pleading was confined to unilateral mistake. In these circumstances the judge on a trial with a jury has without consent of the parties no jurisdiction to determine issues of fact not raised by the pleadings: nor in my opinion would a general consent to determine issues not decided by the jury include a power without express further consent after the jury had been discharged to amend pleadings so as to raise further issues of fact. Similarly the powers of the Court of Appeal which, under Order LVIII., r. 4, are wider than those of the judge, are limited in the case of trials by jury to determine issues of fact in cases where only one finding by a jury could be allowed to stand. Further, I think that the Court of Appeal cannot without amendment decide a case upon an unpleaded issue of law which depends upon an unpleaded issue of fact. If the issue of fact can be fairly determined upon the existing evidence they may of course amend: but in any such case amendment appears to me to be necessary. In this House in the course of the hearing an amendment was tendered by the plaintiffs which

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

did aver a mutual mistake. In the view that I take of the whole case it becomes unnecessary to deal finally with the appellants' complaint that the points upon which the plaintiffs succeeded were not open to them. I content myself with saying that much may be said for that contention.

Two points present themselves for decision. Was the agreement of March 19, 1929, void by reason of a mutual mistake of Mr. D'Arcy Cooper and Mr. Bell ?

Could the agreement of March 19, 1929, be avoided by reason of the failure of Mr. Bell to disclose his misconduct in regard to the cocoa dealings ?

My Lords, the rules of law dealing with the effect of mistake on contract appear to be established with reasonable clearness. If mistake operates at all it operates so as to negative or in some cases to nullify consent. The parties may be mistaken in the identity of the contracting parties, or in the existence of the subject-matter of the contract at the date of the contract, or in the quality of the subject-matter of the contract. These mistakes may be by one party, or by both, and the legal effect may depend upon the class of mistake above mentioned. Thus a mistaken belief by A. that he is contracting with B., whereas in fact he is contracting with C., will negative consent where it is clear that the intention of A. was to contract only with B. So the agreement of A. and B. to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, but I know of no case where a seller has so committed himself. This is a case where mutual mistake certainly and unilateral mistake

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

by the seller of goods will prevent a contract from arising. Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is naturali ratione inutilis. This is the case of *Cooper* v. *Phibbs* (1), where A. agreed to take a lease of a fishery from B., though contrary to the belief of both parties at the time A. was tenant for life of the fishery and B. appears to have had no title at all. To such a case Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Applied to the context the statement is only subject to the criticism that the agreement would appear to be void rather than voidable. Applied to mistake as to rights generally it would appear to be too wide. Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a breach of a stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void.

Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law. The principles to be applied are to be found in two cases which, as far as my knowledge goes, have always been treated as

(1) L. R. 2 H. L. 149.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

authoritative expositions of the law. The first is *Kennedy* v. *Panama Royal Mail Co.* (1)

In that case the plaintiff had applied for shares in the defendant company on the faith of a prospectus which stated falsely but innocently that the company had a binding contract with the Government of New Zealand for the carriage of mails. On discovering the true facts the plaintiff brought an action for the recovery of the sums he had paid on calls. The defendants brought a cross action for further calls. Blackburn J., in delivering the judgment of the Court (Cockburn C.J., Blackburn, Mellor and Shee JJ.), said: "The only remaining question is one of much greater difficulty. It was contended by Mr. Mellish, on behalf of Lord Gilbert Kennedy, that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company *bonâ fide* believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. And, if the invalidity of the contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz* v. *Bartlett* (2) and *Gurney* v. *Womersley* (3), where the person who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of this decision being that the thing handed over was not the thing paid for. A similar principle was acted on in *Ship's Case.* (4) There is, however, a very important difference between cases

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(1) L. R. 2 Q. B. 580, 586.
(2) 2 E. & B. 849.
(3) (1854) 4 E. & B. 133.
(4) (1865) 2 De G. J. & S. 544.

H. L. (E.)
1931
Bell
v.
Lever
Brothers,
Ld.
Lord Atkin.

where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract: *Street* v. *Blay*." (1)

The Court came to the conclusion in that case that, though there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, it did not prevent the shares from being in substance those he applied for.

The next case is *Smith* v. *Hughes* (2), the well known case as to new and old oats. The action was in the county court, and was for the price of oats sold and delivered and damages for not accepting oats bargained and sold. Cockburn C.J. cites Story on Contracts as follows: "Mr. Justice Story (3) in his work on Contracts (vol. i., s. 516), states the law as to concealment as follows: 'The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed.' 'Thus,' he goes on to say (s. 517), 'although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of caveat emptor, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee.' 'But,' he continues (s. 518), 'an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract.' Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519) that with reference to the latter the rule is 'that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case.' In the doctrine thus laid down I entirely agree."

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(1) (1831) 2 B. & Ad. 456.

(2) L. R. 6 Q. B. 597, 604, 606.

(3) [This attribution was mistaken: the author was not the celebrated text-writer and judge but his son W. W. Story, later in life better known as a sculptor and a writer about Rome, where he resided. —F. P.]

In a further passage he says: "It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiffs to sell new, so the two minds were not ad idem; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses that he thought the horse was sound? The cases are exactly parallel."

Blackburn J. said: "In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

The Court ordered a new trial. It is not quite clear whether they considered that if the defendant's contention was correct, the parties were not ad idem or there was a contractual condition that the oats sold were old oats. In either case the defendant would succeed in defeating the claim.

In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

We are now in a position to apply to the facts of this case the law as to mistake so far as it has been stated. It is essential on this part of the discussion to keep in mind the finding of the jury acquitting the defendants of fraudulent misrepresentation or concealment in procuring the agreements in question. Grave injustice may be done to the defendants and confusion introduced into the legal conclusion, unless it is quite clear that in considering mistake in this case no suggestion of fraud is admissible and cannot strictly be regarded by the judge who has to determine the legal issues raised. The agreement which is said to be void is the agreement contained in the letter of March 19, 1929, that Bell would retire from the Board of the Niger Company and its subsidiaries, and that in consideration of his doing so Levers would pay him as compensation for the termination of his agreements and consequent loss of office the sum of 30,000*l.* in full satisfaction and discharge of all claims and demands of any kind against Lever Brothers, the Niger Company or its subsidiaries. The agreement, which as part of the contract was terminated, had been broken so that it could be repudiated. Is an agreement to terminate a broken contract different in kind from an agreement to terminate an unbroken contract, assuming that the breach has given the one party the right to declare the contract at an end? I feel the weight of the plaintiffs' contention that a contract immediately determinable is a different thing from a contract for an unexpired term, and that the difference in kind can be illustrated by the immense price of release from the longer contract as compared with the shorter. And I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment of a lease for three years, still less a term for a few months. But, on the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. A. buys B.'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B. has made no representation as to soundness and has not contracted that the horse is sound, A. is bound and cannot recover back the price. A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty. A. agrees to take on lease or to buy from B. an unfurnished dwelling-house. The house is in fact uninhabitable. A. would never have entered into the bargain if he had known the fact. A. has no remedy, and the position is the same whether B. knew the facts or not, so long as he made no representation or gave no warranty. A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a byepass road which will divert substantially the whole of the traffic from passing A.'s garage. Again A. has no remedy. All these cases involve hardship on A. and benefit B., as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e., agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

This brings the discussion to the alternative mode of expressing the result of a mutual mistake. It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties—namely, that the contract could not be terminated till the end of the current term. The question of the existence of conditions, express

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties, express or implied. They have agreed, but on what terms. One term may be that unless the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect. With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally accepted as underlying the principle of the frustration cases is contractual, an implied condition. Sir John Simon formulated for the assistance of your Lordships a proposition which should be recorded: "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact."

I think few would demur to this statement, but its value depends upon the meaning of "a contractual assumption," and also upon the true meaning to be attached to "basis," a metaphor which may mislead. When used expressly in contracts, for instance, in policies of insurance, which state that the truth of the statements in the proposal is to be the basis of the contract of insurance, the meaning is clear. The truth of the statements is made a condition of the contract, which failing, the contract is void unless the condition is waived. The proposition does not amount to more than this that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry how to ascertain whether the contract does contain such a condition./ Various words are to be found to define the state of things which make a condition. "In the contemplation of both parties fundamental to the continued validity of the contract," "a

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

foundation essential to its existence," "a fundamental reason for making it," are phrases found in the important judgment of Scrutton L.J. in the present case. The first two phrases appear to me to be unexceptionable. They cover the case of a contract to serve in a particular place, the existence of which is fundamental to the service, or to procure the services of a professional vocalist, whose continued health is essential to performance. But "a fundamental reason for making a contract" may, with respect, be misleading. The reason of one party only is presumedly not intended, but in the cases I have suggested above, of the sale of a horse or of a picture, it might be said that the fundamental reason for making the contract was the belief of both parties that the horse was sound or the picture an old master, yet in neither case would the condition as I think exist. Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts. Thus, in *Krell* v. *Henry* (1), Vaughan Williams L.J. finds that the subject of the contract was "rooms to view the procession": the postponement, therefore, made the rooms not rooms to view the procession. This also is the test finally chosen by Lord Sumner in *Bank Line* v. *Arthur Capel & Co.* (2), agreeing with Lord Dunedin in *Metropolitan Water Board* v. *Dick Kerr* (3), where, dealing with the criterion for determining the effect of interruption in "frustrating" a contract, he says: "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted." We therefore get a common standard for mutual mistake,

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(1) [1903] 2 K. B. 740, 754.
(2) [1919] A. C. 435.
(3) [1918] A. C. 119, 128.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Atkin.

and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts? To apply the principle to the infinite combinations of facts that arise in actual experience will continue to be difficult, but if this case results in establishing order into what has been a somewhat confused and difficult branch of the law it will have served a useful purpose.'

I have already stated my reasons for deciding that in the present case the identity of the subject-matter was not destroyed by the mutual mistake, if any, and need not repeat them.

It now becomes necessary to deal with the second point of the plaintiffs—namely, that the contract of March 19, 1929, could be avoided by them in consequence of the non-disclosure by Bell of his misconduct as to the cocoa dealings. Fraudulent concealment has been negatived by the jury; this claim is based upon the contention that Bell owed a duty to Levers to disclose his misconduct, and that in default of disclosure the contract was voidable. Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner. Unless this contract can be brought within this limited category of contracts uberrimae fidei it appears to me that this ground of defence must fail. I see nothing to differentiate this agreement from the ordinary contract of service; and I am aware of no authority which places contracts of service within the limited category I have mentioned. It seems to me clear that master and man negotiating for an agreement of service are as unfettered as in any other negotiation. Nor can I find anything in the relation of master and servant, when established, that places agreements between them within the protected category. It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant; and if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase in salary and recover back the extra wages paid? If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers.

I agree with the view expressed by Avory J. in *Healey* v. *Société Anonyme Française Rubastic* (1) on this point. It will be noticed that Bell was not a director of Levers, and, with respect, I cannot accept the view of Greer L.J. that if he was in fiduciary relationship to the Niger Company he was in a similar fiduciary relationship to the shareholders, or to the particular shareholders (Levers) who held 99 per cent. of the shares. Nor do I think that it is alleged or proved that in making the agreement of March 19, 1929, Levers were acting as agents for the Niger Company. In the matter of the release of the service contract and the payment of 30,000*l*. they were acting quite plainly for themselves as

(1) [1917] 1 K. B. 946.

principals. It follows that on this ground also the claim fails.

The result is that in the present case servants unfaithful in some of their work retain large compensation which some will think they do not deserve. Nevertheless it is of greater importance that well established principles of contract should be maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the Courts loose powers of introducing terms into contracts which would only serve to introduce doubt and confusion where certainty is essential.

I think therefore that this appeal should be allowed; and I agree with the order to be proposed by my noble and learned friend, Lord Blanesburgh.

LORD THANKERTON. My Lords, the detailed facts of this case have been sufficiently stated already by your Lordships. The findings of the jury were accepted by all parties, who were also agreed that the Court should have leave to draw inferences of fact generally.

The two main contentions between the parties are whether the agreements of March, 1929, are liable to be set aside, (*a*) on the ground of mutual mistake or error, or (*b*) by reason of the non-disclosure of material facts by the appellants, whereby Lever Brothers were induced to enter into these agreements.

The judgment of both Courts below was unanimously against the appellants on the first point, and, while Wright J. expressed no opinion, the Court of Appeal was also unanimously against the appellants on the second point, though the first point was sufficient for their disposal of the case. The appellants, however, must succeed on both points in order to succeed in their appeal.

Both these points raise important questions of principle, and I regret to find myself unable to agree with the conclusions of the Courts below on either point. In this view, it is unnecessary for me to deal with the two further questions

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord Thankerton.

—namely, whether the first point is open to the respondents on the pleadings and the course of procedure, and whether the obligation in Mr. Bell's service agreement as to payment by Lever Brothers of the premiums on an endowment policy remains binding, despite the setting aside of the agreement of March, 1929.

The findings of the jury establish that the appellants' four cocoa transactions in November and December, 1927, constituted a breach of contract or duty towards the respondents, which would have entitled Lever Brothers to terminate the appellants' contracts of service either in January, 1928, or March, 1929, and that Lever Brothers would have exercised such right at either of these dates. The jury also found that the Niger Company would have been entitled to dismiss the appellants from their positions as chairman and vice-chairman respectively on either of these dates and would have done so. The jury further found that Lever Brothers entered into the agreements of March, 1929, in ignorance of these transactions of the appellants and that, if Lever Brothers had known of them, they would not have entered into these agreements. As regards the state of the appellants' mind, the question and answer was as follows: "At the date of the respective interviews prior to these agreements, had the defendant Bell or the defendant Snelling in mind their actings in respect of these transactions?" to which the jury's answer was "No." By their earlier answers the jury had acquitted the appellants of inducing Lever Brothers to enter into the agreements of March, 1929, by fraudulent misrepresentation of faithful and honest service or by fraudulent concealment of their cocoa transactions.

It will be convenient to deal first with the question whether the appellants had a duty to disclose their cocoa transactions to Lever Brothers when negotiating the agreements of March, 1929. If there was such a duty, there is no doubt that the failure to disclose—though innocent—amounted to a misrepresentation as to material facts which induced Lever Brothers to enter into these agreements, and which

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Thankerton

would entitle the latter to rescind them. The learned judges of the Court of Appeal appear to regard the duty to disclose as arising at the time of negotiating the contract, but I am unable to see that any such duty could arise out of the circumstances of these agreements; in my opinion, the first question must be whether the appellants incurred a duty to disclose these transactions at the time that they were completed. The failure to account for the profits to the Niger Company, on which some of the learned judges lay stress, was an integral part of the breach of duty to that company. The appellants had just as much—or just as little—right to continue drawing their salaries without disclosure as they had to negotiate two years later for the commutation of these same salaries. In truth, the negotiations in March, 1929, were at arm's length, and not on the footing of the relationship of master and servant, but for the termination of that relationship, and, if there was not an already existing breach of an obligation to disclose, I am unable to see how the circumstances of the agreements of March, 1929, could be held to create such an obligation.

In the absence of fraud, which the jury has negatived, I am of opinion that neither a servant nor a director of a company is legally bound forthwith to disclose any breach of the obligations arising out of the relationship, so as to give the master or the company the opportunity of dismissal; on subsequent discovery, the master or company will not be entitled to hold the dismissal as operating from the date of the breach, but will be liable for wages or salary earned by the servant during the intervening period. In my opinion *Healey* v. *Société Anonyme Française Rubastic* (1), which was the case of the managing director of a company, was rightly decided. There may well be cases in which the concealment of the misconduct amounts to a fraud on the master or company, but the jury have excluded that view in the present case. The other cases to which we were referred relate to a duty to disclose all material facts on formation of a contract, and form exceptions to the general rule, which does not impose such a duty. The most familiar of these exceptions is found in the case of policies of insurance, as to which Blackburn J. says, in *Fletcher* v. *Krell* (1), "mercantile custom has established the rule with regard to concealment of material facts in policies of assurance, but in other cases there must be an allegation of moral guilt or fraud." Other exceptions are found in cases of trustee and cestui que trust and of a company issuing a prospectus and an applicant for shares, but the number of exceptions is limited, and no authority has been cited which extends the exceptions to cover a case such as the present.

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(1) [1917] 1 K. B. 946.

Accordingly I am of opinion that the appellants had no legal duty to disclose their cocoa transactions either at the time of their commission or in negotiation for the agreements of March, 1929.

Turning next to the question of mutual error or mistake, I think that the respondents' contention may be fairly stated as follows—namely, that in concluding the agreements of March, 1929, all parties proceeded on the mistaken assumption that the appellants' service agreements were not liable to immediate termination by Lever Brothers by reason of the appellants' misconduct, and that such common mistake involved the actual subject-matter of the agreements, and did not merely relate to a quality of the subject-matter.

The cases on this branch of the law are numerous, and in seeking the principle on which they rest I will at first confine my attention to those which relate to innocent mutual mistake on formation of the contract, as it appears to me that the cases relating to facts arising subsequently to the formation of the contract may be found to rest on a somewhat different principle.

But first let me define the exact position as at the date of the agreements of March, 1929. The service agreements of both appellants were then existing as binding legal contracts, although it was in the power of Lever Brothers, had they then known of the appellants' breach of contract, to have terminated the contracts; but, until the exercise of such power, the contracts remained binding. It is also clear that an essential purpose of the agreements of March, 1929, was to secure the termination of these service agreements. The mistake was not as to the existence of agreements which required termination—for such did exist—but as to the possibility of terminating them by other means.

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(1) 28 L. T. 105.

A clear exposition of the principles to be applied in such a case as the present is to be found in the judgment of the Court of Queen's Bench (Cockburn C.J., Blackburn, Mellor and Shee JJ.), in *Kennedy* v. *Panama, &c., Co.* (1), delivered by Blackburn J., who, as Lord Blackburn, reaffirmed this opinion in 1881 in *Mackay* v. *Dick.* (2) In *Kennedy's* case the plaintiff had taken shares in a further issue of capital by the Panama Company, being induced by a statement in the prospectus that the purpose of the issue was to enable the company to carry out a contract recently entered into with the Government of New Zealand for the carriage of mails. That contract had been made with the agent of the New Zealand Government, both parties believing that he had authority to make it; but it turned out that he had no such authority, and the Government refused to ratify it. Having failed on the charge of fraud and deceit against the directors of the company for making the statements in the prospectus, the plaintiff submitted a second contention, which is stated in the judgment as follows: "It was contended . . . . that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company bona fide believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he applied for one thing and got another. And, if the invalidity of the

(1) L. R. 2 Q. B. 580, 586, 587, 588.

(2) 6 App. Cas. 251, 265.

H. L. (E.)
1931
BELL
v.
LEVER
BROTHERS,
LD.
Lord
Thankerton.

contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz* v. *Bartlett* (1) and *Gurney* v. *Womersley* (2), where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of decision being that the thing handed over was not the thing paid for."

The respondents' contention in the present appeal is in effect the same as the above contention; they maintain that the service agreements surrendered to them are not the service agreements paid for, in respect that they were immediately defeasible by them. Blackburn J. proceeds: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty." After referring to the passages in the Digest of Civil Law and the way the question is there mooted,

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(1) 2 E. & B. 849.

(2) 4 E. & B. 133.

Blackburn J. says: "The answers given by the great jurists quoted are to the effect that, if there be misapprehension as to the substance of the thing, there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding." And he adds: "And, as we apprehend, the principle of our law is the same as that of the civil law." This passage makes clear that it is not enough for the purchaser to prove that the misapprehension was the inducing cause to him and that, if he had known, he would not have entered into the contract. The earlier passage as to the sale of an unsound horse also shows that it is not enough that a grossly excessive price has been paid for a bad article. In that case it was held that the shares obtained by Kennedy in the company were not substantially different things but that the case was analogous to that of the horse supposed to be sound.

It is pointed out in *Kennedy's* case (1) that, if the directors had known that the contract was not valid, the contract might have been avoided on the ground of a fraudulent misrepresentation. In the present case, there being no obligation to disclose, the appellants, if they had had their misconduct in mind, would have been entitled to say nothing about it, and the respondents, in the absence of fraud, would have been bound by the contracts, even though, if they had known, they would not have entered into the contracts, but would have terminated the service agreements. I have difficulty in seeing how the fact that the appellants did not remember at the time is to put the respondents in a better position.

The phrase "underlying assumption by the parties," as applied to the subject-matter of a contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter. In the present case, however probable it may be, we are not necessarily forced to that assumption. *Cooper* v. *Phibbs* (1) is a good illustration, for both parties must necessarily have proceeded on the mistaken assumption that the lessor had the right to grant the lease and that the lessee required a lease; Lord Westbury says: "The respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

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(1) L. R. 2 Q. B. 580.

In *Scott* v. *Coulson* (2) it was common ground that at the date of the contract for sale of the life policy both parties supposed the assured to be alive, the result being that the plaintiffs were willing to accept as the best price they could get for the policy a sum slightly in advance of its surrender value and very much below the sum due on the death of the assured. As a matter of fact the assured was dead. It was therefore clear that the subject-matter of the contract was a policy still current with a surrender value and that accordingly the subject-matter did not exist at the date of the contract. *Couturier* v. *Hastie* (3), where the cargo sold was held not to have existed at the date of sale, and *Strickland* v. *Turner* (4), where the annuitant was in fact dead at the date of sale of the annuity, were cases where the subject-matter was not in existence at the date of the contract. There are many other cases to the same effect, but I think that it is true to say that in all of them it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract, or it was an inevitable inference from the nature of the contract that all the parties so regarded it.

In the present case the terms of the contracts throw no light on the question, and, as already indicated, I do not find sufficient material to compel the inference that the appellants, at the time of the contract, regarded the indefeasibility of the service agreements as an essential and integral element in the subject-matter of the bargain.

(1) L. R. 2 H. L. 149, 170.

(2) [1903] 1 Ch. 453; affirmed [1903] 2 Ch. 249.

(3) 5 H. L. C. 673.

(4) 7 Ex. 208.

The range of authorities relating to some alteration in circumstances subsequent to the date of the contract do not, in my opinion, raise a question of mutual error or mistake; in them the formation of the contract is complete and binding, but subsequent events arise which critically affect the contract, but whose occurrence has not been provided for in the contract. However it may be stated, when relief from the contract is given, the Court, as it appears to me, rests such relief on an implied condition which forms part of a complete and binding contract, but which, on the happening of certain events, terminates the contract. These authorities appear to me, therefore, to have no bearing on the question of error or mistake as rendering a contract void owing to failure of consideration.

Accordingly, I am of opinion that the appellants are entitled to succeed in their appeal and that the judgments of the Courts below, so far as appealed against by them, should be reversed. I therefore concur in the motion to be proposed by my noble and learned friend, Lord Blanesburgh.

Order of the Court of Appeal reversed. Order of Wright J. and judgment entered thereunder varied by directing that judgment be entered for the plaintiffs the Niger Company, Limited, for the sum of 5l. damages awarded by the jury in their answer to question 3 (B) on the issue raised by para. 17 of the amended points of claim without costs; and so much of the order of Wright J. as directed that the sum of 1360l. should be paid out to the plaintiffs the Niger Company, Limited, affirmed. Save as aforesaid, the order of Wright J. and the judgment thereunder set aside and judgment entered for the defendants with costs. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's

H. L. (E.)
1931
Bell
v.
Lever
Brothers,
Ld.

Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 15, 1931.

Solicitors for the appellants: *Birkbeck, Julius, Edwards & Co.*

Solicitors for the respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)*
1931
Dec. 15.

ENGLISH SCOTTISH AND AUSTRALIAN BANK, LIMITED . . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE . . . . RESPONDENTS.

Revenue—Stamp Duty—Agreement for Sale of simple Contract Debts owed by Debtors resident Abroad—Exemption from Duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

An agreement for the sale of (amongst other things) simple contract debts owed by debtors resident out of the United Kingdom is exempt from ad valorem stamp duty in respect of such debts upon the ground that they are "property locally situate out of the United Kingdom" within the meaning of the exception in s. 59, sub-s. 1, of the Stamp Act, 1891.

Smelting Company of Australia, Ld. v. *Inland Revenue Commissioners* [1897] 1 Q. B. 175; *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245; and *Velazquez, Ld.* v. *Inland Revenue Commissioners* [1914] 3 K. B. 458 overruled.

APPEAL from an order of the Court of Appeal affirming an order of Rowlatt J. upon a Case stated by the Inland Revenue Commissioners under s. 13 of the Stamp Act, 1891.

By an agreement under seal dated April 1, 1927, and executed in Australia, the appellants, the English Scottish

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD. v. INLAND REVENUE COMMISSIONERS.

and Australian Bank, Ld., agreed to purchase the assets of the Royal Bank of Australia, Ld., including certain contract debts owing on overdrafts by residents outside the United Kingdom. The facts are fully stated in the opinion of Lord Macmillan.

By s. 59, sub-s. 1, of the Stamp Act, 1891, as amended by s. 7 of the Revenue Act, 1909, " Any contract or agreement . . . . for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, ... shall be charged with " an ad valorem duty to be paid by the purchaser.

The Inland Revenue Commissioners, in assessing the agreement to stamp duty, included the consideration representing the simple contract debts in question. The appellants objected that these debts were property locally situate outside the United Kingdom, but the assessment was upheld by Rowlatt J. and the Court of Appeal on the authority of *Velazquez, Ld.* v. *Inland Revenue Commissioners.* (1)

1931. Nov. 12, 13. *Wilfrid Greene K.C.* and *H. G. Robertson* for the appellants. In the eye of the law choses in action have a local habitation. That principle has been applied from the earliest days in every branch of jurisprudence, and the decision appealed from is based on no conceivable principle. The question of the locality of a simple contract debt was first argued in the time of Elizabeth, when the lawful jurisdiction to administer the assets of a deceased person depended upon the locality in which the assets were found, and ever since that time it has been held that a simple contract is situate where the debtor resides. In whatever context the question arises it has always been decided by reference to the rule that the locality of a simple contract debt is determined by the residence of the debtor. There is no case in which this rule has not been applied, except in the case of the Stamp Act, 1891 : *Royal Trust Co.* v. *Attorney-General for Alberta* (2) ; *Vere* v. *Jeffries* (3) ; *Byron* v.

(1) [1914] 3 K. B. 458.

(2) [1930] A. C. 144, 150.

(3) (1579) 3 Dyer, 305 *a*, note, and see 4 Leon. 211.

Byron (1); *Yeomans* v. *Bradshaw* (2); *Hilliard* v. *Cox* (3); Wentworth on Executors (1641 ed.), p. 57; Comyns' Dig. Tit. Administrator, vol. i., p. 485; Rolle's Abr. Tit. Executor, p. 909; Bacon's Abr., Tit. Executors and Administrators (E.), p. 462; *Attorney-General* v. *Dimond* (4); *Attorney-General* v. *Hope* (5); *Attorney-General* v. *Bouwens* (6); *Commissioner of Stamps* v. *Hope* (7); *Rex* v. *Lovitt* (8); *Toronto General Trusts Corporation* v. *The King* (9); *Earl of Tyrone* v. *Marquis of Waterford* (10); *Guthrie* v. *Walrond* (11); *In re Clark* (12); *Martin* v. *Nadel* (13); *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (14); *In re Maudslay, Sons & Field* (15); *New York Life Insurance Co.* v. *Public Trustee.* (16) As to *Smelting Company of Australia* v. *Inland Revenue Commissioners* (17), where the Court of Appeal held that a licence to work a patent in Australia was not within the exception in s. 59, sub-s. 1, of the Stamp Act, 1891, both grounds of the decision—namely, that "property" in the exception must be limited to immovable property in accordance with the ejusdem generis rule, and that intangible things could have no local situation, were disapproved by this House in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (18) *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (19) simply followed the *Smelting Company's* case (17), and the *Danubian* case in turn was followed by *Urban* v. *Inland Revenue Commissioners* (20), the Court of Appeal being of opinion that the *Smelting Company's* case (17) had not been overruled by the House of Lords in *Muller's* case (18). Finally, those cases were followed by *Velazquez, Ld.* v. *Inland Revenue Commissioners* (21), which

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(1) (1596) 1 Cro. Eliz. 472.
(2) (1696) Carthew, 373.
(3) (1700) 1 Ld. Raym. 562.
(4) (1831) 1 Cr. & J. 356, 369.
(5) (1834) 1 C. M. & R. 530, 560.
(6) (1838) 4 M. & W. 171, 191.
(7) [1891] A. C. 476, 481.
(8) [1912] A. C. 212, 218, 220, 221
(9) [1919] A. C. 679, 682.
(10) (1860) 1 D. F. & J. 613, 628.
(11) (1883) 22 Ch. D. 573, 575.
(12) [1904] 1 Ch. 294, 297–8.
(13) [1906] 2 K. B. 26, 31.
(14) [1923] 1 K. B. 673, 678, 680, 681.
(15) [1900] 1 Ch. 602, 609.
(16) [1924] 2 Ch. 101, 109, 114, 119.
(17) [1897] 1 Q. B. 175.
(18) [1901] A. C. 217, 223, 227.
(19) [1901] 1 K. B. 245.
(20) (1912–13) 29 Times L. R. 141; 476.
(21) [1914] 2 K. B. 404; [1914] 3 K. B. 458.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD. *v.* INLAND REVENUE COMMISSIONERS.

precisely covers the present case. In the appellants' submission the exception in the sub-section applies to any intangible thing as to which you can predicate that it has a local situation, and for over 300 years it has been held that a debt has a local situation. It follows that there is nothing left of the decisions of the Court of Appeal in the *Smelting Company's* case and in the *Velazquez* case.

J. H. Stamp (*Sir William Jowitt A.-G.* with him) for the respondents. De facto a debt has no local situation; it is only per fictionem legis that it has one. The decisions relating to the situation of debts for the purposes of death duty arose out of practical considerations which do not apply to the construction of s. 59 of the Stamp Act, 1891. The *Smelting Company's* case (1) has not been overruled by *Muller's* case (2), and, having regard to the lapse of time since that case and the cases which followed it were decided, they must be treated as having settled the law. No principle is here involved, for under s. 59, sub-s. 1, equitable interests are taxable everywhere.

The House took time for consideration.

1931. Dec. 15. LORD BUCKMASTER. My Lords, the question on this appeal is whether an agreement for the purchase of debts owed by debtors who reside out of the United Kingdom is liable to an ad valorem stamp duty based on such debts.

The history of the matter is quite simple. The appellants are a company incorporated in this country under the Companies Acts, and on April 1, 1927, they entered into an agreement with the Royal Bank of Australia, Ld., a company incorporated in Victoria, Australia, for the purchase from the Australian Bank of all the assets of that bank with certain inconsiderable exceptions.

Part of those assets consisted of simple contract debts owing by customers of the Royal Bank resident outside the United Kingdom on overdrafts, a small portion of which had been granted by an office in London, but practically the whole

(1) [1897] 1 Q. B. 175.

(2) [1901] A. C. 217.

had been granted in Australia. None of these debts were specialty debts, or secured by bills of exchange or other negotiable instruments.

The Commissioners for Inland Revenue included in their assessment for stamp duty all the debts to which I have referred, and the question on this appeal is whether such assessment was correct.

Rowlatt J. and the Court of Appeal have upheld the assessment, regarding themselves, rightly as I think, bound by the decision in the Court of Appeal (*Velazquez, Ld.* v. *Inland Revenue Commissioners* (1)), and the real point for consideration of this House is whether that decision should be overruled.

The section of the Stamp Act, 1891, s. 59, sub-s. 1, that is applicable is, omitting matters not relevant, in the following terms: "59.—(1.) Any contract or agreement, ... for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, ... shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

The question that arises upon this is whether debts are capable of a local situation, and, if they are, whether that situation should be assumed to be out of the United Kingdom so that the property is within the exception mentioned in the section. That for purposes of probate and estate duty a simple contract debt is assumed to be situated where the debtor resides is established by a long series of authorities that stretch far back into the mists of antiquity. Instead of discussing the earlier cases, I think it better to take the latest of these authorities, the case of *Royal Trust Co.* v. *Attorney-General for Alberta.* (2)

In that case Lord Merrivale, delivering the opinion of the Board, used these words: "The local situation proper to be attributed to the various assets of a deceased person has long been governed under our law by rules, no doubt somewhat artificial in character, which were evolved when the lawful jurisdiction to direct the administration of such assets depended upon the locality in which the assets were found. Many of the Courts concerned had authority within small provincial areas only. A simple contract debt due from a debtor resident outside the jurisdiction within which the testator resided was not assets within that jurisdiction," and he might have added, but within the jurisdiction where the debtor resided.

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(1) [1914] 3 K. B. 458.

(2) [1930] A. C. 144, 150.

I have examined, but I do not think it necessary to discuss, the earlier authorities, for the statement I have already referred to is in my judgment an accurate statement of law.

The cases where a similar question has arisen in consideration of wills are conveniently summarized in *Guthrie* v. *Walrond* (1), and in these cases gifts of property situate in a particular place have been held to include simple contract debts from debtors there resident.

Cases of wills, however, are always open to the criticism that their construction depends upon ascertaining what the testator meant, and this is affected by many considerations not present in the consideration of an Act of Parliament.

These authorities, therefore, may be passed by with the comment that they did at least recognize that a debt may be localized somewhere, and that is one of the first matters for consideration in this case.

Did the matter rest there, I should have thought that when the local situation of a debt had been recognized for two such important purposes as probate and gift by will, the local situation so attributed would be that referred to in the section of the statute. But authority has intervened, and has prevented this conclusion being reached until after a careful examination of the meaning and validity of such decisions.

In *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2) it was decided by the Court of Appeal

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(1) 22 Ch. D. 573.

(2) [1897] 1 Q. B. 175.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD. v. INLAND REVENUE COMMISSIONERS.
Lord Buckmaster.

that a licence to work a patent in Australia and a share in a patent in New South Wales were not locally situated outside the United Kingdom within the meaning of the statute. Lord Esher and Lopes L.J. thought that the words "or property situate outside the United Kingdom" ought to be regarded as ejusdem generis with the property described in the prescribing sentence, but this interpretation was disapproved in this House, in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (1), and it needs no further comment beyond saying that it appears to be based on the view that the word "or" in the section is equivalent to "and," a view with which I cannot agree.

Lord Esher also thought that such rights as were there in question could have no locality. They were incorporeal, incapable of being handled or seen, and therefore, in his view, could not be situate anywhere. Rigby L.J. based his decision on the ground that the property could be bought and sold here, a feature certainly not distinctive of the particular property there in dispute.

In *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (2) the question arose as to whether the goodwill of a German business was locally situate outside the United Kingdom, and this House thought that it was, though Lord Halsbury held that it was not. In that case Lord Macnaghten said: "It is not easy to form a conception of property having no local situation" and Lord Davey added: "I express no opinion on the abstract question whether an incorporeal right can have a local situation, beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases", while Lord Lindley said that he saw no difficulty in assuming that such property was capable of local situation, and that indeed for legal purposes such a local situation must be assumed. The actual question therefore was not decided, but valuable help had been afforded to those on whom the ultimate duty of decision should be cast.

(1) [1901] A. C. 217, 223, 227.

(2) [1901] A. C. 217.

The exact question then arose in the case of *Velazquez, Ld.* v. *Inland Revenue Commissioners.* (1) This was first heard before Scrutton J. He regarded the decision in the *Smelting Company of Australia* case (2) as binding upon him, and not in terms overruled by *Muller's* case (3), which in his view was decided upon the ground that the goodwill was in some way attached to real estate. This opinion he expressed in the following words: "I am therefore . . . . bound to hold that a personal right to a debt not attached in any way to land has no local situation." The Court of Appeal took the same view, and the case proceeded no further. It is therefore plain that in order to decide whether the *Velazquez* case (1) was right or wrong, the *Smelting Company of Australia* case (2) and *Muller's* case (3) must be carefully examined.

The first of these most clearly depends upon the assumption that incorporeal property can have no locality, and it is true that it has not the attributes of place and substance like a chattel which you can handle and move from one place to another. But debts do, in one form or another, represent property of very considerable value in the modern world, and it appears to me it is desirable that they should possess a locality, even if they are invested with it by means of a legal fiction. Nor can I see why, when that locality has been attributed for several centuries for purposes of jurisdiction in the administration of estates, it should be regarded as impossible when dealing with the Stamp Act.

It is in my opinion a fair assumption that the statute was passed with knowledge of the well established law relating to probate, and the phrases then used would be perfectly proper to cover debts where the debtors were out of the United Kingdom.

I think, too, that the view of *Muller's* case (3) is too narrow in basing the decision solely on the ground of goodwill being attached to some form of hereditament. Lord Lindley certainly regarded a debt as capable of local situation, and there is nothing in any of the other Lords' opinions (apart from that of Lord Halsbury) that differs from this view.

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(1) [1914] 2 K. B. 404, 410; [1914] 3 K. B. 458.

(2) [1897] 1 Q. B. 175.

(3) [1901] A. C. 217.

If, however, once it be assumed that a debt must have a local situation, as I think it must, it can only be where the debtor or the creditor resides, and the fact that it has for other and similar purposes been assumed to be determined by the residence of the debtor and not the creditor is a sufficient reason for holding that that is its situation for the purpose of the statute.

For this reason I think the *Australian Smelting Company's* case (1) and *Velazquez'* case (2) were wrongly decided, and should be overruled.

I have made no reference to the difference in the locality between simple contract debts and specialty debts, as the point is not relevant to this appeal, and I desire to avoid matter that is immaterial. In my opinion therefore the appeal should be allowed with costs, and I beg to move accordingly.

LORD WARRINGTON OF CLYFFE (read by LORD THANKERTON). My Lords, by the joint effect of s. 59, sub-s. 1, of the Stamp Act, 1891, and s. 7 of the Revenue Act, 1909, any contract or agreement for the sale of any interest in any property except lands, tenements, hereditaments or heritages or property locally situate out of the United Kingdom . . . . is to be charged with the same ad valorem duty . . . . as if it were an actual conveyance on sale of the interest or property contracted or agreed to be sold.

The question in this appeal is whether for the purposes of the above mentioned statute an agreement for the sale of (amongst other things) certain simple contract debts owing by debtors in Australia to an Australian Bank is in respect of such debts liable to be charged with an ad valorem duty, the appellants contending that such debts are locally situate out of the United Kingdom and are therefore within the exception specified in the statute. Rowlatt J. and the Court of Appeal decided in favour of the Crown, conceiving

(1) [1897] 1 Q. B. 175.

(2) [1914] 3 K. B. 458.

themselves bound by the decision in *Velazquez, Ld.* v. *Inland Revenue Commissioners.* (1)

The agreement in question was dated April 1, 1927, and was made between the Royal Bank of Australia, Ld., a company incorporated in Australia, and carrying on its main business in that country, of the one part, and the appellants, a company incorporated in this country under the Companies Acts, of the other part, for the sale and purchase of, with some immaterial exceptions, the whole of the business, goodwill, and assets of the Royal Bank as a going concern. It was found by the Commissioners that of the total consideration for the sale the sum of 3,362,347*l.* 18*s.* 7*d.* was the consideration for the sale of advances made in Australia by the Royal Bank to residents outside the United Kingdom, and the sum of 13,482*l.* 7*s.* 7*d.* was the consideration for the sale of advances made by the London Branch of the Royal Bank to residents outside the United Kingdom. The debts in respect of all these advances were simple contract debts. It is the local situation of these debts which is in question.

In this, as in other cases depending on the construction of a statute, it is necessary to look at the words themselves. The section imposes an ad valorem duty on agreements for the sale of amongst other things any interest in "any property except lands, tenements, hereditaments or heritages or property locally situate out of the United Kingdom."

Two of the learned judges who decided the case of *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2) expressed the view that by an application of the so-called ejusdem generis rule "property locally situate out of the United Kingdom" should be confined to property akin to lands, tenements, hereditaments or heritages. This view was not accepted by the third member of the Court and has since been finally rejected by this House: *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (3) Simple contract debts therefore are "property" within the exception. If this is so, then it is clear, I think, from the subsequent

(1) [1914] 3 K. B. 458.
(2) [1897] 1 Q. B. 175.
(3) [1901] A. C. 217.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD.
v.
INLAND REVENUE COMMISSIONERS.
Lord Warrington of Clyffe.

words that the Legislature recognized the possibility of such debts having a local situation. I therefore, on the statute itself without reference to authority, could not accept the view that intangible property such as a simple contract debt is incapable of having a local situation at all. Parliament cannot in my opinion be taken to have included debts in the exception and at the same time to have imposed a condition impossible of fulfilment. But, indeed, the task of discovering secundum fictionem legis a local situation for an intangible legal conception has long been a familiar one. One example is that of finding a residence for a company. A company exists in law apart from the human beings which compose it, the company itself cannot eat or sleep—common tests of residence in human beings—yet the Courts have found no difficulty in attributing residence to it and ascertaining its locality. The position is really summed up by Lord Lindley in the *Muller & Co.'s Margarine* case in this House (1) when he says that the legal conception of property involves the legal conception of existence somewhere.

Once it is established that a debt may have a local situation the rules of law by reference to which such situation is to be determined are settled beyond question.

So far back as the reign of Elizabeth in *Byron* v. *Byron* (2) Anderson J. is reported as saying: "The debt" (namely, that in question in that case) "is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor; and this difference hath been oftentimes agreed."

The earlier cases no doubt are concerned with the locality of an item of property for the purpose of ascertaining whether it is covered by a probate granted by an Ordinary with a limited local jurisdiction, but the rule has been recognized and applied in a variety of circumstances. A very useful statement of it is contained in the judgment prepared by Lord Field, of the Judicial Committee, in *Commissioner of Stamps* v. *Hope* (3), and in a more recent case it is stated by

(1) [1901] A. C. 217, 236.
(2) 1 Cro. Eliz. 472.
(3) [1891] A. C. 476, 481.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD. *v.* INLAND REVENUE COMMISSIONERS.
Lord Warrington of Clyffe.

Lord Cave, who says the general principle is well settled: *Toronto General Trusts Corporation* v. *The King.* (1)

In my opinion, in accordance with the rule above referred to, the debts in question being all simple contract debts are locally situate where the debtors reside, that is to say, in Australia and out of the United Kingdom.

It only remains to refer to certain authorities relied upon by the Crown. The one actually followed by Rowlatt J. and the Court of Appeal was *Velazquez, Ld.* v. *Inland Revenue Commissioners* (2), but this decision merely followed the previous case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (3), which itself followed the case of *Smelting Company of Australia* v. *Inland Revenue Commissioners.* (4) The subject-matter in this last case was certain patent rights in Australia, and was based upon the view that the words locally situate cannot apply to something which has no locality. With the greatest respect to the learned judges who expressed that view I prefer that of Lord Lindley above referred to. Indeed, in the *Smelting Company's* case (4) one would have thought the Australian locality was unusually clear. The subject-matter was a licence to use an Australian patent—namely, a monopoly confined to Australia, and I think but for the erroneous view referred to above the decision must have been the other way. In my opinion this case and the other cases dependent upon it must be taken to be overruled.

For the above reasons I think the appeal should be allowed and the ad valorem duty reduced accordingly. The respondents must pay the costs here and below.

LORD TOMLIN (read by LORD THANKERTON). My Lords, the question to be determined in this case is whether an agreement for the purchase of the assets of an Australian banking business, including book debts owing from debtors resident in Australia, is exempt from stamp duty in respect of such book debts on the ground that they are within the exception of s. 59, sub-s. 1, of the Stamp Act, 1891, as being property locally situate out of the United Kingdom.

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(1) [1919] A. C. 679, 683.

(2) [1914] 2 K. B. 404; [1914] 3 K. B. 458.

(3) [1901] 1 K. B. 245.

(4) [1897] 1 Q. B. 175.

The Courts below, regarding themselves as bound by the decision of the Court of Appeal in *Velazquez, Ld.* v. *Inland Revenue Commissioners* (1), affirmed, without delivering reasoned judgments, the assessment of the Commissioners of Inland Revenue whereby the agreement was assessed to duty in respect of the book debts in question.

In *Velazquez, Ld.* v. *Inland Revenue Commissioners* (1) the Court of Appeal had held that book debts owing from persons resident in Argentina were not property locally situate out of the United Kingdom within the exception of s. 59, sub-s. 1.

In so holding the Court had considered itself bound by the decision of the Court of Appeal in *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commissioners* (2), where the benefit of a contract enforceable against a resident in Roumania for the transfer of a certain quantity of land in a certain locality in Roumania, the exact situation of the land to be selected by the transferee of the land, was held not to be property within the exception.

The Court responsible for the last mentioned decision had in its turn treated the case before them as falling within the principle of *Smelting Company of Australia* v. *Inland Revenue Commissioners.* (3) There a share in a New South Wales patent and a sole licence to work the patent in a district of New South Wales were held by the Court of Appeal not to be covered by the exception and not to be within the principle of *Muller & Co.'s Margarine, Ld.* v. *Inland Revenue Commissioners* (4), in which the goodwill of a business carried on abroad was treated by the Court of Appeal as covered by the exception, a conclusion subsequently affirmed by your Lordships' House on different grounds.

It becomes necessary therefore to examine the validity of the decision in *Smelting Company of Australia* v. *Inland Revenue Commissioners* (3), which is the basis of the line of cases culminating in the decision now under appeal.

(1) [1914] 3 K. B. 458.
(2) [1901] 1 K. B. 245.
(3) [1897] 1 Q. B. 175.
(4) [1900] 1 Q. B. 310; [1901] A. C. 217.

In *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1) Lord Esher M.R. and Lopes L.J. expressed the view that the words "property locally situate out of the United Kingdom" ought to be read as ejusdem generis with the words preceding them, thus excluding from its operation choses in action. The observations of Lord Davey and Lord Lindley in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (2) make it plain that that view was not well founded.

Further, Lord Esher and Lopes L.J. held that, as the property could not be touched or seen or placed anywhere, it was incapable of being brought within the meaning of the words "locally situate" or of being said to exist in any locality.

Rigby L.J., who differed from the other members of the Court upon the question of ejusdem generis, concurred with them in the result, because he was of opinion that the persons claiming exemption were bound to show that the property was not capable of being dealt with in this country, and because he was not satisfied that patent rights had any local situation anywhere within the meaning of the words "locally situate."

So far as this decision rested upon the impossibility of there being a local situation for an intangible asset or upon the asset being saleable in this country, it is in my opinion inconsistent with the opinions expressed in your Lordships' House in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (3), where the goodwill of a foreign business was held to have a local situation abroad, and where Lord Lindley in terms disapproved the reasoning of Lord Esher and Lopes L.J., and also that of Rigby L.J., pointing out in regard to the latter that any property situate anywhere can be agreed to be sold in any other country.

I share the view expressed in the same case by Lord Macnaghten that it is not easy to form a conception of property having no local situation. In fact for many purposes choses in action have in the past been held to have a local situation. The decisions under s. 59, sub-s. 1, so far as they treat choses in action as having no local situation, constitute a singular exception to the general trend of decisions on other topics where the question of "local situation" in relation to a chose in action has come under consideration.

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(1) [1897] 1 Q. B. 175.

(2) [1901] A. C. 217, 225, 234.

(3) [1901] A. C. 217, 223, 237, 238.

To explain this singular exception it has been urged before your Lordships that in cases outside the Stamp Act where local situation in relation to choses in action fell for consideration it was essential to find that the asset had in fact some local situation, whereas under the Stamp Act, as every asset is charged, unless it is brought substantively within the exception the necessity for showing an actual local situation does not arise.

Having regard, however, to s. 14, sub-s. 4, of the Stamp Act, whereby by way of sanction to the charging provisions of the Act an instrument relating to any property in any part of the United Kingdom is made inadmissible in evidence and is not available for any purpose unless it is duly stamped, it is plain that the problem of local situation under the Act is one which does involve the fixing of the situation of an asset as being either within or without the United Kingdom. The distinction suggested between cases under the Act and other cases cannot therefore in my opinion be supported, and I am unable to see why a principle should be applied to cases under the Act different from that applied in the other classes of case to which reference was made in argument before your Lordships.

In my opinion under s. 59, sub-s. 1, for the purpose of the exception under consideration, it is necessary to resolve whether the asset, be it a chose in action or not, is situate in or out of the United Kingdom, and the test of the situation of a simple contract debt is to be found in the place of residence of the debtor.

I think that *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1); *Danubian Sugar Factories, Ld.* v.

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(1) [1897] 1 Q. B. 175.

Inland Revenue Commissioners (1) and *Velazquez, Ld.* v. *Inland Revenue Commissioners* (2) were all wrongly decided. In *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (3) your Lordships' House affirmed the Court of Appeal, but in my opinion made it clear that the reasoning of the Court of Appeal in that case was erroneous so far as it was based on the view that a goodwill cannot have a local situation unless it is annexed to premises upon which the business is carried on.

My Lords, I think that this appeal should succeed, and I concur in the motion proposed.

Lord Macmillan. My Lords, by an agreement for sale executed in Australia the appellants, the English Scottish and Australian Bank, Ld., of London and Melbourne, agreed to purchase the business and assets of the Royal Bank of Australia, Ld., whose head office is in Melbourne. The assets agreed to be sold include certain debts owing to the Royal Bank by customers resident outside the United Kingdom in respect of overdrafts. These debts fall into two categories—namely, advances made in London by the London office of the Royal Bank to residents outside the United Kingdom amounting to 13,482*l.* 7*s.* 7*d.*, and advances made in Australia to residents outside the United Kingdom amounting to 3,262,347*l.* 18*s.* 7*d.* They are in all cases simple contract debts not secured by specialty. The question is whether these debts constitute "property locally situate out of the United Kingdom" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891. If they are, the agreement for sale is entitled to exemption, so far as regards the consideration for the sale of these particular assets, from the stamp duty imposed by that section on "any contract or agreement . . . . [under seal, or under hand only] (4) . . . . for the sale of any estate or interest in any property." It should be noted that since the passing of the Revenue Act, 1909, s. 7, the duty is exigible in respect of any contract or agreement for

(1) [1901] 1 K. B. 245.
(2) [1914] 3 K. B. 458.
(3) [1901] A. C. 217, 223, 237, 238.
(4) Rep. Revenue Act, 1909, Sched.

H. L. (E.)
1931
ENGLISH SCOTTISH AND AUSTRALIAN BANK, LD. *v.* INLAND REVENUE COMMISSIONERS.
Lord Macmillan.

the sale of property irrespective of the place of its execution, but with the same exceptions as before.

The Courts below, holding themselves bound, as the appellants conceded that they were, by the decision in the case of *Velazquez, Ld.* v. *Inland Revenue Commissioners* (1), have held, without delivering judgments, that the items in question comprised in the agreement of sale are not "property locally situate out of the United Kingdom." The present appeal is accordingly in effect an appeal from that previous decision. In the case of *Velazquez, Ld.*, the Court of Appeal regarded themselves as bound by the decision in the case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (2), and in the latter case in turn the Court of Appeal stated that they were bound by the decision in the case of *Smelting Company of Australia* v. *Inland Revenue Commissioners.* (3) The last named case is accordingly the starting point of the series of decisions which your Lordships are invited to reconsider.

I propose in the first place to say a few words on the terms of the section of the Stamp Act itself. It is undisputed that the word " property " used in the description of the contracts or agreements subjected to duty extends to every kind of property, corporeal and incorporeal, and therefore embraces simple contract debts. When the section goes on to except property locally situate out of the United Kingdom I see no reason to assume that the term " property " is used any less extensively in the exception. I should therefore naturally read the section as excepting simple contract debts situate out of the United Kingdom, simple contract debts being one form of property. When the question of the local situation of a particular form of property is submitted for judgment I do not think it will do to say that it has in law no situation anywhere. The section, as I read it, contemplates that all property with which it deals must be situated either within or out of the United Kingdom. This may be reinforced by a reference to s. 14, sub-s. 4, which forbids

(1) [1914] 3 K. B. 458.

(2) [1901] 1 K. B. 245.

(3) [1897] 1 Q. B. 175.

the production in evidence of any instrument relating to "any property situate . . . . in any part of the United Kingdom" unless it is duly stamped. If the true view be that simple contract debts have in law no situation, then an unstamped instrument relating to simple contract debts would not come within the prohibition, for it would not be an instrument relating to any property situate in any part of the United Kingdom; it would relate to property situated nowhere. The Act in my view does not permit the question of where any particular kind of property is situated to be evaded by holding that it is not situated anywhere, for every kind of property must be situated either within or outside the United Kingdom.

I now turn to the case of the *Smelting Company of Australia* (1) as the fountain-head of the subsequent course of decisions. The subject-matter of discussion there was an agreement for the sale (inter alia) of a share in a patent granted in New South Wales and a licence to use in a district of that colony the invention protected by the patent. These rights were held not to be "property locally situate out of the United Kingdom." The Master of the Rolls (Lord Esher) and Lopes L.J. in so holding proceeded on the grounds (1.) that the word "property" in the exception must be construed as referring to real property because it followed on an enumeration of "lands, tenements, hereditaments or heritages"; and (2.) that the rights in question not being visible or tangible had in truth and in fact no locality and therefore could not be said to be "situate out of the United Kingdom" because they were not situated anywhere. The first of these grounds is clearly untenable. The structure of the section precludes the application of the ejusdem generis or noscitur a sociis rule for the reasons assigned by Rigby L.J., with whose judgment on this point I agree. Having avoided this error, however, Rigby L.J. falls into a scarcely less serious one, for he appears to hold that only property which can be the subject of sale and purchase in the United Kingdom is in law situate in the United Kingdom. This would render the exception as extensive as the rule for "any property situate anywhere can be agreed to be sold or purport to be sold in any other country" (per Lord Lindley in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.*). (1) Finally, however, the learned Lord Justice expresses his concurrence with the second of the reasons advanced by his colleagues, and bases his judgment "mainly or almost entirely" on the ground that he is "not satisfied that patent rights have any local situation anywhere." This then was the ground of judgment common to all the members of the Court. In my opinion it is quite unsound. As I have already said, it is not permissible under the statute to hold that any property has no situation. All property must be either within or out of the United Kingdom and there is no intermediate limbo.

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(1) [1897] 1 Q. B. 175.

Having reached the conclusion that the statute requires a decision as to the local situation of simple contract debts I find ample guidance in authority for the solution of the problem. It is of course true that a debt cannot be touched or handled and cannot be physically situated anywhere. But the law has shown itself quite capable, where necessary, of determining the local situation of an incorporeal right. The question arose at a very early date in connection with probate jurisdiction and later in connection with probate duty. Mr. Wilfrid Greene for the appellants has conducted your Lordships through a long and impressive series of decisions relating to these topics beginning in the reign of Elizabeth which emphatically establish that for these purposes a simple contract debt is situated within the area of the local jurisdiction within which the debtor for the time being resides. I may add to his list of citations *Fernandes' Executors Case* (2), where it was held that a simple contract debt due by an English company to a deceased resident in India was situated in England, the residence of the debtor. As an authoritative statement of the law I quote the words of Lord Field, delivering the judgment of the Privy Council

(1) [1901] A. C. 217, 238.

(2) (1870) L. R. 5 Ch. 314.

in the well known case of *Commissioner of Stamps* v. *Hope* (1): "Now a debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided." In *Rex* v. *Lovitt* (2) the same principle was again affirmed by the Privy Council.

It was suggested that the doctrine just enunciated was peculiar to probate cases. Apart from the illustrations of its application in other departments of the law which Mr. Greene adduced, I venture to express my agreement with Lord Lindley, who said: "The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us." That was said in the only case, so far as I am aware, on s. 59 of the Stamp Act which has reached your Lordships' House: *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (3) The subject-matter of discussion there was an agreement for the sale of the goodwill of a business carried on in Germany, and the decision was that the goodwill was "property situate out of the United Kingdom." The Crown advanced the argument that goodwill was incorporeal and could not be situate anywhere. Dealing with this argument Lord Macnaghten said: "I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation" ; Lord Davey said that he did not "express any opinion on the abstract question whether an incorporeal right can have a local situation, beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases" ; and Lord Lindley said: "The legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are dealing not with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible." One would have thought that as the view that incorporeal rights had no local situation within the meaning of the Act was the only common ground of judgment in the case of the *Smelting Company of Australia* (1), the authority of that decision was seriously impaired by the expressions of opinion in this House which I have just quoted. It was not, however, expressly overruled, and Lord Lindley, who alone cites it, contented himself with saying that it did not deal, as did the case before him, with the goodwill of a foreign business. The *Danubian Sugar Factories* case (2), though cited in the argument, was not referred to in any of the speeches in this House. When the *Velazquez* case (3) came before the Court of Appeal the *Danubian Sugar Factories* case (2), not having been expressly disapproved by this House, was regarded as a still binding authority, and the case of *Muller & Co.'s Margarine* (4) was distinguished on the ground that the goodwill with which it dealt was only held to be situate out of the United Kingdom because it was attached to land situated abroad. Swinfen Eady L.J., differing from Lord Lindley, expressed the view that the cases on probate duty were of no assistance. It is true that

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(1) [1891] A. C. 476, 481–2.

(2) [1912] A. C. 212.

(3) [1901] A. C. 217, 223, 227, 236.

(1) [1897] 1 Q. B. 175.
(2) [1901] 1 K. B. 245.
(3) [1914] 3 K. B. 458.
(4) [1901] A. C. 217.

in the case of *Muller & Co.'s Margarine* (1) in this House emphasis was laid on the association of the goodwill with business premises situated abroad, but the decision was that a right of an incorporeal nature had a locality and that that locality was out of the United Kingdom.

For myself I can see no reason why simple contract debts should have a local situation for the purpose of probate duty but no local situation for the analogous purpose of stamp duty. So far from regarding the probate cases as anomalous I regard the principle upon which they have been decided as the sound principle and the stamp duty cases in the Court of Appeal as an aberration which your Lordships have now an opportunity of correcting.

Holding as I do that the simple contract debts here in question, being due by persons resident out of the United Kingdom, are situated where these persons are resident and are therefore property situate out of the United Kingdom within the meaning of s. 59, sub-s. 1, of the Stamp Act, I concur in the motion that the appeal be allowed.

LORD BUCKMASTER. My Lords, my Lord Atkin desires me to say that he concurs in the opinion I have expressed.

Order of the Court of Appeal reversed. Declared that the agreement in question is not liable to ad valorem duty as assessed by the Commissioners upon the sums 13,482*l.* 7*s.* 7*d. and* 3,262,347*l.* 18*s.* 7*d. The respondents to repay to the appellants the excess of duty amounting to* 32,758*l. paid by the appellants to the respondents in conformity with such erroneous assessment. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Dec. 15, 1931.

Solicitors for the appellants: *Slaughter & May.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

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(1) [1901] A. C. 217.

[PRIVY COUNCIL.]

J. C.* 1931 Nov. 9.

ABEYESEKERA . . . . APPELLANT;

AND

JAYATILAKE . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Constitutional Law—Legislative Council—Order in Council—Reservation of Power to amend Order—Action for Penalties—Amending Order in Council—Indemnity—Ceylon (Legislative Council) Order, 1923, *arts.* 16, 17—*Ceylon (Legislative Council) Amendment Order,* 1928, *arts.* 2, 3.

An Order in Council of 1923 made provision as to the Legislative Council in Ceylon, but reserved to His Majesty power to revoke, alter or amend the Order. The appellant, as common informer, brought an action to recover penalties under the Order from the respondent, who he alleged had sat and voted after his seat had become vacant under its provisions by reason of his having a pecuniary interest in a contract with the Government. In 1928, after the action had been brought, but before its trial, an amending Order in Council was made providing that the action should be dismissed; it also amended the Order of 1923 so as to except the office held by the respondent from its operation.

Held, that the Order of 1928 was valid, having regard to the power reserved by the Order of 1923, and was an effective defence to the action, although it was retrospective in its operation.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 88 of 1930) from a decree of the Supreme Court of Ceylon (March 30, 1930) affirming a decree of the District Court of Colombo (March 11, 1929).

The appellant brought an action in the District Court to recover, as common informer, penalties to which he alleged that the respondent was liable under the Ceylon (Legislative Council) Order of 1923, by reason of having sat and voted in the Legislative Council after his seat had become vacant under the terms of the Order.

The District Court dismissed the action having regard to the provisions of the Ceylon (Legislative Council) Amendment Order of 1928, which was made after the action was instituted. An appeal to the Supreme Court was dismissed by Fisher C.J.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, and LORD DARLING.

J. C.
1931
ABEYESEKERA
v.
JAYATILAKE.

and Garvin J., who affirmed the view of the District Judge that the Order in Council of 1928 was valid and afforded a defence to the action.

The facts and the material terms of the Orders in Council of 1923 and 1928 appear from the judgment of the Judicial Committee.

The Order of 1923, which superseded an Order of 1920, provided that the Legislative Council should consist of twelve official and thirty-seven unofficial members, of whom twenty-nine were to be elected members. The elected members were subject to the provisions of arts. XVI. and XVII., set out in the present judgment, with regard to penalties and the disqualification. Art. XLVII. provided, as in the case of the Legislative Council previously constituted, that the Governor, with the advice and consent of the Council, might make laws for the peace, order, and good government of the Island; and art. XLVIII. provided that no law so made was to take effect until assented to by or on behalf of His Majesty in the manner therein provided. The District Judge stated that although the right of the King to make laws was not reserved by the Order of 1920, letters patent of September 20, 1920, while revoking earlier letters patent, which had reserved to His Majesty the power to make laws with the advice and consent of Parliament or with the advice of the Privy Council, expressly reserved that power.

1931. Oct. 13. *De Gruyther K.C.* and *H. I. P. Hallett* for the appellant. The appellant had an accrued right under the Order of 1923 to recover the penalties sued for, and the respondent could be relieved of liability only by an Act of indemnity passed by a competent legislature. The Order of 1923 having created for Ceylon a representative legislature without reserving the right to legislate by Order in Council, the legislature so created was the only competent legislature, apart from the Imperial Parliament. It is true that the Order of 1923 reserved the power to amend its provisions, but art. II. of the Order of 1928, which purported to exonerate the respondent, was not an amendment but

J. C.
1931
ABEYESEKERA
v.
JAYATILAKE.

simply an indemnifying provision; art. III. was an amending provision, but had no retrospective effect, and without art. II. was not an effective defence to the action. [Reference was made to *Campbell* v. *Hall* (1), also to s. 1 of the Colonial Laws Validity Act, 1865.]

Dunne K.C. and *Colombos* for the respondent were not called upon.

Their Lordships stated that they would advise that the appeal should be dismissed for reasons to be delivered later.

Nov. 9. The reasons of their Lordships were delivered by

LORD DARLING. This is an appeal from a decree of the Supreme Court of the Island of Ceylon, dated March 20, 1930, confirming a decree of the District Court of Colombo dated March 11, 1929, whereby was dismissed an action which the plaintiff (the appellant in this case) had brought against the respondent, defendant.

In that action the appellant, as common informer, sued the respondent by virtue of art. XVI. of the Ceylon (Legislative Council) Order in Council, 1923, alleging that he, having pecuniary interests in a contract with the Government within the meaning of art. XVII. of the Order, had sat and voted in the Legislative Council on numerous occasions and had thereby rendered himself liable to penalties.

Certain interlocutory matters were decided in the action, but before the action came on for trial an Order in Council, the Ceylon (Legislative Council) Amendment Order in Council, 1928, was made on November 1, 1928, and came into force on December 14, 1928.

This Order, after reciting that His Majesty had reserved to himself power to revoke, alter or amend the Order of 1923, enacted as follows: "II. No action, prosecution or legal proceeding whatsoever under the provisions of art. XVI. of the principal Order or otherwise, shall be brought, instituted or maintained—(*a*) for the recovery of any penalty incurred, or alleged to have been incurred, under the said article,

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(1) (1774) 1 Cowp. 204.

J.C.
1931
ABEYESEKERA
v.
JAYATILAKE.

whether for the amount prescribed therein, or not; or (*b*) for the recovery of any damages, the enforcement of any forfeiture or penal consequences or the declaration of any vacancy or incapacity against the editor of the Singhalese Etymological Dictionary for or on account of or in respect of his having sat or voted in the Council as an elected member thereof at any time between January 24, 1924, and the date of the coming into operation of this Order in Council after his seat became, or is alleged to have become, vacant by reason of his having any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the public service, or of his having accepted a public office under the Crown in the Island, within the meaning of art. XVII. of the principal Order; and if any such action, prosecution or legal proceeding has been, or shall hereafter be, brought or instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make.

III. Art. XVII. (1.) of the principal Order is hereby amended by the addition thereto of the following proviso: 'Provided that nothing in this article shall be construed so as to render vacant the seat of any elected member of the Council on the ground that by reason of his being or becoming an editor of the Singhalese Etymological Dictionary he has, or may have, any such pecuniary interest in any contract with the Government of this Island as aforesaid, or has accepted any public office under the Crown in this Island within the meaning of this article.' "

On January 28, 1929, the defendant filed a motion that the action be dismissed; and on March 11, 1929, the learned judge of the District Court made an order dismissing the action, leaving each party to bear his own costs. This order was confirmed by the Supreme Court. Against that order the present appeal is brought.

This case is of importance constitutionally, as raising the question of the right of His Majesty in Council to make the Order of November 1, 1928. It is necessary, therefore, to state how the jurisdiction of His Majesty over Ceylon arose.

J. C.
1931
ABEYESEKERA
v.
JAYATILAKE.

The Island of Ceylon became, in the eighteenth century, part of His Majesty's dominions by reason of conquest and cession; and since that time has been governed by the Sovereign as a Crown colony on which certain rights of legislation and executive government have been conferred by letters patent and Orders in Council. That His Majesty's rights are, in these circumstances, well founded is sufficiently established by the judgment of Lord Mansfield in the case of *Campbell* v. *Hall* (1), where he says: "No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in Parliament. Coke's Report of the arguments and resolutions of the judges in *Calvin's Case* (2), lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament. It is plain he alludes to his own country, because he alludes to a country where there is a parliament."

This status endures merely so long as the Island is not constituted a colony, but remains simply a conquest. Once it becomes a colony the King can act only within the constitution granted and applicable to that colony. Thenceforward the King, by his own act—from which he may not derogate—has, subject to all reservations, precluded himself from proceeding otherwise.

The constitution of the Island of Ceylon derives from letters patent of September 11, 1920, passed under the great seal of the United Kingdom, constituting the office of Governor and Commander-in-Chief of the Island of Ceylon and its dependencies. Art. XIII. of those letters patent runs as follows: "XIII. We do reserve to Ourselves, Our heirs, and successors, Our and their undoubted right with the advice and consent of Parliament, or with the advice of Our or their Privy Council, to make from time to time all such laws as may to Us or them appear necessary for the

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(1) 1 Cowp. 204, 211. (2) (1608) 7 Co. Rep. 1a, 17b.

J. C.
1931
ABEYESEKERA
v.
JAYATILAKE.

peace, order and good government of the Island, as fully and effectually as if these presents had not been made."

In 1923 there was made the Ceylon (Legislative Council) Order in Council of December 19, establishing the present Legislative Council and dealing with many matters connected with it. Art. LXVII. of this Order in Council is as follows: "His Majesty hereby reserves to Himself, His Heirs and Successors, power, with the advice of His or Their Privy Council, to revoke, alter, or amend this Order as to Him or Them shall seem fit."

The action which gives rise to this appeal is founded upon arts. XVI. and XVII. of this Order in Council of December 19, 1923, which are as follows:—

"XVI. Every person who . . . . shall sit or vote in the Council after his seat has become vacant shall for every day on which he sits or votes after his seat has become vacant be liable to a penalty of Rs.500 to be recovered by action in the District Court of . . . . by any person who shall sue for the same.

"XVII. If any elected member of the Council shall . . . . have any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the public service . . . . or shall accept any public office under the Crown in the Island his seat in Council shall thereupon become vacant."

It was alleged in the action that the respondent had rendered himself liable under these sections in that, having been elected a member of the Legislative Council prior to 1927, he had in April, 1927, then being editor-in-chief of the Etymological Dictionary of the Singhalese language, gained or obtained, and still had, a direct or indirect pecuniary interest in a contract with the Government of the Island for or on account of the public service, or alternatively had accepted and still held a public office under the Crown in the Island within the meaning of the said art. XVII. It was also claimed that by reason of the premises the respondent's seat in the Legislative Council had become vacant in April, 1927, and that he had nevertheless sat and voted in the

Council since 1927 on various dates specified and had thereby incurred the penalty amounting to a total of Rs.23,000, which the appellant, by virtue of art. XVII., was entitled to recover in that action. It is unnecessary to consider whether the claim of the plaintiff in that action was well founded or not, for on November 1, 1928, the Order in Council, the material terms of which have already been stated, was made.

The Order in Council of March 21, 1924, is irrelevant as regards this action, and need not be again mentioned.

If the Order in Council of November 1, 1928, be valid, it is obvious that any rights which the appellant may have had in regard to the matters for which his action was brought exist no longer, and its validity is the sole question to be decided upon this appeal. In their Lordships' opinion, there was power in His Majesty to make the Order in Council now objected to. It was argued that this was an exercise of the royal prerogative by the King in Council, as the supreme executive officer of the Island. It appears to their Lordships that this was not an exercise of the royal prerogative in that sense. It is indeed the exercise by His Majesty, as Sovereign, of the legislative powers inherent in him by his title derived from conquest and cession of Ceylon, so far as he had not parted with any of them by acts of his own; and their Lordships are of opinion that it is plain from the letters patent and Orders in Council already recited that His Majesty had expressly reserved to himself the right to do that which, by the Order in Council now in question, he undoubtedly has done. Such right as the plaintiff may have had arose entirely out of the Order in Council of December 19, 1923, which was made by His Majesty in Council by virtue of the same authority as that which justifies the making of the Order in Council of November 1, 1928. Their Lordships are of opinion that, while it would not have been competent for His Majesty, by virtue of the royal prerogative alone, to make either Order, he was perfectly competent and had sufficient right and title to make them both by virtue of the legislative authority he had reserved to himself when parting with a portion of the right originally vested in him.

J. C.
1931
ABEYESEKERA
v.
JAYATILAKE.

It was argued that the Order in Council of November 1, 1928, was ultra vires as affecting to take away rights already in existence, thus having a retrospective action. The effect, however, of the Order of 1928, as expressed on the face of it, was no more than an act of indemnity and relief in respect of penalties incurred. It may be true that "not Jove himself upon the past hath power"; but legislators have certainly the right to prevent, alter or reverse the consequences of their own decrees. There is no necessity to give instances to prove that they have frequently done so; even going so far as to restore the heritable quality to blood which had been deprived of its virtue by Acts of attainder. Indeed, in the last session of the Parliament which has just ended, legislation, precisely similar to that here called in question, was passed to deprive a plaintiff of penalties already accrued by reason of breaches of the Lord's Day Act.

Their Lordships have therefore humbly advised His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *O. A. Cayley.*
Solicitor for respondent: *H. S. L. Polak.*

[PRIVY COUNCIL.]

J. C.*
1931
Nov. 27.

ASSICURAZIONI GENERALI . . . . APPELLANTS;

AND

SELIM COTRAN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Life Insurance—Pre-War Policy—Ottoman Subjects—Trieste Company—Agreement to pay Gold Francs—Currency—Treaty of Lausanne, 1923, *section II., Annex* (2).

In 1909 an insurance company, whose principal place of business at all times material was at Trieste, issued a policy to a man and his wife, Ottoman subjects domiciled in Palestine, agreeing that upon the death of either the company would pay 10,000 gold francs to the survivor. Trieste was Austrian territory in 1909, but in 1920 it became Italian territory under the Treaty of St. Germain. The Treaty of Lausanne made between the allied powers, including Italy, and the Ottoman Empire was signed on July 24, 1923, and became part of the municipal law of Palestine in 1924. The Treaty, as translated, provided that "life assurance policies contracted in currencies other than Turkish pounds, entered into before October 29, 1914, between companies possessing at this date [actuellement] the nationality of an allied power and Turkish nationals" should be settled, if the amount was stipulated in gold francs, by paying French francs for the period before November 18, 1915, and Turkish paper pounds for the period after that date. The wife having died in 1925, the husband claimed 10,000 gold francs under the policy. The company was willing to pay 10,000 francs at the then rate of exchange in Paris; that was more favourable to the assured than payment in Turkish pounds.

Held, that the provision of the Treaty of Lausanne applied, as the company was of Italian nationality at the date of the Treaty, and that consequently the assured was not entitled to payment in gold francs.

Judgment of the Supreme Court of Palestine reversed.

APPEAL (No. 18 of 1930) from a judgment of the Supreme Court of Palestine (April 3, 1929) reversing a judgment of the District Court of Jerusalem (March 6, 1928).

In 1909 the appellants, who at all material times carried on business at Trieste as an insurance company, issued to the respondent and his wife, Ottoman subjects domiciled in Palestine, a policy of insurance agreeing that upon the death of either they would pay to the survivor 10,000 gold francs.

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* *Present:* LORD BLANESBURGH, LORD DARLING, and LORD RUSSELL OF KILLOWEN.

The respondent's wife having died in 1925, he brought an action in the District Court claiming an amount in sterling equivalent to 10,000 gold francs. The appellants contended that having regard to the Treaty of St. Germain of 1920, by which Trieste had been transferred from Austria to Italy, and to para. 2 of the Annex to section II. of the Treaty of Lausanne of 1923, their liability could be discharged in French francs. The Treaty of Lausanne operated as part of the law of Palestine under Palestine Ordinance No. 28 of 1925.

The two judges in the District Court differed. Upon an appeal to the Supreme Court the contention of the present appellants was rejected.

The material provisions of the Treaty of Lausanne appear from the judgment of the Judicial Committee.

1931. Jan. 16, 19; Oct. 28. *H. I. P. Hallett* for the appellants.

The respondent did not appear.

Nov. 27. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The question raised on this appeal is whether the moneys (10,000 francs) payable by the appellant insurance company under a policy of life insurance, are payable at the rate of exchange of gold currency or of paper francs.

The relevant facts are these :—

The policy was issued by the insurance company on December 11, 1909, on the application of the respondent, Selim Cotran, and his wife, Matilde Cotran, who were Ottoman subjects domiciled at Acre, Palestine. The liability of the insurance company, according to a certified translation of the policy, ran thus : " Undertakes to pay the amount of gold francs ten thousand immediately on the death of one of the assured to the survivor, or at the latest on

December 15, 1929, to the assured themselves if they be still living."

The consideration for the insurance was the payment of a half-yearly premium of 257.66 francs. Mrs. Matilde Cotran died on July 7, 1925. At the date of her death the premium due on June 15, 1925, had not been paid, but a period of thirty days' grace, which was conceded by the policy, was still current.

All the earlier premiums had been paid and accepted by the insurance company, but owing to the difficulties and restrictions which arose after Turkey had entered into the war, the form of such payments varied at different times. Although at one time the insurance company relied upon this course of business between the parties in relation to the payments of premiums, in support of their contentions before the Board, their Lordships at an early stage indicated their view that the circumstances in question could have no effect in altering the legal effect of the provisions of the policy as to the payment of the moneys thereby secured. Thereafter the point was no longer pressed, and accordingly it becomes unnecessary to consider the form in which these premiums were respectively paid.

When Mr. Cotran died, the insurance company proposed to pay to the respondent in satisfaction of his claims under the policy the sum of 10,000 francs by cheque on Paris. The respondent thereupon commenced these proceedings in the District Court of Jerusalem, claiming payment of the equivalent in Egyptian money of 10,000 francs gold.

The insurance company claimed that by virtue of the treaty of peace with Turkey, which as from August 6, 1924, operated as part of the municipal law of Palestine, there was no obligation on the insurance company to pay 10,000 francs gold.

The two judges who heard the case were divided in opinion. Judge Valero held that by virtue of the treaty the amount was not payable in francs gold. On the other hand, Judge Baraday was of opinion that the treaty, on its true interpretation, did not warrant a departure from the terms of the

J. C.
1931
ASSICURAZIONI GENERALI
v.
SELIM COTRAN.

policy, which provided for payment in francs gold. The result of this division of opinion was that the claim of the plaintiff was dismissed. The operative part of the judgment, dated March 6, 1928, is in the following terms: "Therefore, accordingly it is decided that the claim as regards judgment for payment in gold currency be dismissed and judgment entered in favour of the plaintiff in frs. banknotes currency at the rate of exchange at the date of death of Mrs. Cotran, July 7, 1925, together with legal interest as from date of the action, May 19, 1926, until full payment. Defendant to pay costs, expenses and LP. 3 advocates' fees. Judgment open to appeal."

On appeal by the plaintiff to the Supreme Court of Appeal of Jerusalem, the judgment was set aside and judgment was entered for the plaintiff on April 3, 1929, "for the amount of the policy moneys, 10,000 francs, less the last premium, 257 francs, at the rate of exchange for gold francs, with interest at 9 per cent. from the date of commencement of action until payment, with costs here and below."

The grounds of this decision were: (1.) that the insurance company was an Austrian company at the time when the insurance was effected and remained an Austrian company throughout the war; (2.) that in those circumstances the relevant provisions of the treaty had no application; and (3.) that accordingly the provisions of the policy for payment of the sum of 10,000 francs gold remained unaffected.

It is from this judgment that the insurance company appeals to His Majesty in Council.

As a result of close and careful argument before the Board, at which the respondent was not represented, the grounds in support of the appeal were reduced to the single question whether the treaty operated to relieve the insurance company from the obligation to pay gold francs as provided by the policy. A consideration of this question speedily revealed the fact that it was essential for their Lordships to be supplied with proper evidence of the true meaning of the French terms used in the relevant parts of the treaty, which was signed in the French language only. It was the duty of the insurance company to have supplied this evidence in the first instance, but they had failed to do so. Their Lordships accordingly gave the insurance company the choice between two alternatives. The first was to have the appeal dismissed. The second was to adduce the necessary evidence upon the terms that the insurance company should in any event bear the costs of the appeal and should give notice to the respondent, who had not appeared before the Board, so as to enable him to appear if he thought fit. The insurance company chose the second alternative and gave full notice to the respondent, who nevertheless still abstained from appearing.

Equipped with the necessary translation, their Lordships now proceed to a consideration of the sole ground upon which it is alleged that this appeal should succeed.

In order to ascertain whether the appellate Court was right in its view that the treaty had no application because the insurance company was an Austrian company at the date of the policy and throughout the war, it is necessary to consider the relevant provisions of the treaty.

The treaty of peace with Turkey was signed at Lausanne on July 24, 1923, by the allied powers, including Italy. It came into force on August 6, 1924. At that date Trieste (where the head office and control of the insurance company were situate) had become Italian territory by virtue of the treaty of St. Germain, which became operative on July 10, 1920.

The relevant provisions of the treaty of Lausanne—namely, para. 2 of the Annex to section II., may (according to the evidence before this Board) be accurately rendered in English thus:—

"*Paragraph* 2.

"It is agreed that life assurance policies contracted in currencies other than the Turkish pound, entered into before October 29, 1914, between companies possessing at this date the nationality of an allied power, and Turkish nationals, in respect of which premiums have been paid before and after November 18, 1915, or even only before that date shall be settled: First, by determining the rights of the assured, in accordance with the general conditions of the policy, for the period before November 18, 1915, in the currency stipulated in the policy, such as is legal tender in the country from which this currency originates (i.e., every amount stipulated in francs, in gold francs, or in actual francs shall be paid in French francs); secondly, for the period after November 18, 1915, in Turkish paper pounds—the Turkish pound being deemed to have pre-war par value.

"If Turkish nationals whose policies were contracted in a currency other than Turkish currency show that they have continued, since November 18, 1915, to pay their premiums in the currency stipulated in the policies, the said policies shall be settled in this same currency, such as is legal tender in the country from which it originates, even for the period after November 18, 1915.

"Turkish nationals whose policies contracted before October 29, 1914, in a currency other than Turkish currency with companies possessing at this date the nationality of an allied power are, owing to payment of premiums, still in force, shall have the option within a period of three months after the coming into force of the present Treaty to restore their policies for the full amount insured in the currency stipulated in their policy, such as is legal tender in the country from which it originates. For this purpose they must pay in this currency the premiums which have accrued due since November 18, 1915. On the other hand, the premiums actually paid by them in Turkish paper pounds since the said date shall be repaid to them in the same currency."

The material provision is that contained in the first sentence of para. 2, in which the words "at this date" represent the French word "actuellement" and refer to the date on which the treaty was signed.

From a perusal of this sentence it seems clear to their Lordships that this provision (whatever its contents may be) applies to all life assurance policies which satisfy in other respects the detailed description, provided that the issuing company possessed the nationality of an allied power at the date of the signing of the treaty—namely, July 24, 1923. Whatever its previous nationality may have been, as to which no inquiry need be made, the insurance company in this case undoubtedly possessed Italian nationality on that date.

Once the true meaning of the French terms is made clear, the basis of the judgment of the appellate Court crumbles away and the fact (if it be the fact) that the nationality of the insurance company was Austrian down to an earlier date is wholly immaterial.

Their Lordships are accordingly of opinion that the policy here in question became subject to and, on maturity, was governed by the treaty of Lausanne.

That being so, it remains to consider what the first sentence of para. 2 provides in relation to this policy. The payment of the 10,000 francs is one of the rights of the assured which must be determined under this clause; and whether the payment falls under the provision "first" or the provision "secondly," it is, their Lordships think, manifest that the right to be paid francs gold has been taken away from the respondent.

It is more advantageous to the respondent that he should be paid in "French francs" rather than in Turkish paper pounds, and the insurance company is content that the former course be adopted.

Their Lordships are of opinion that the judgment of the appellate Court was erroneous and should be discharged, with the result that the judgment of March 6, 1928, will be restored, with its liability on the insurance company to pay costs as therein mentioned. As to the costs in the appellate Court, these should lie as they have fallen: that is to say, if the insurance company has not yet paid them, the liability to pay shall cease; if the insurance company has already paid them, there shall be no right of recoupment by set-off or otherwise. As to the costs of the appeal here, since the respondent has not appeared, no order need be made in respect thereof.

The two supplemental records will be treated as incorporated with and forming part of the record before the Board.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *William A. Crump & Son.*

[PRIVY COUNCIL.]

JARDINE AND ANOTHER . . . . APPELLANTS;

AND

ATTORNEY - GENERAL FOR NEWFOUNDLAND AND ANOTHER . . . RESPONDENTS.

J. C.*
1932
Jan. 12.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland—Timber License—Breach of Condition—Forfeiture—Waiver—Acceptance of Rent—"Conditions herein contained"—Incorporation of Statutory Conditions—Penalties—Damages—Absence of contractual Obligation—Crown Lands Act, 1903 (3 *Edw.* 7, *c.* 6, *Newfd.*), *s.* 25, *as amended* 1911—*Crown Lands Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 15), *s.* 2.

A timber license over an area in Newfoundland for ninety-nine years was issued in 1915 under the local Crown Lands Act, 1903, as amended in 1911, the licensee agreeing to pay an annual rent and royalties. The license provided that it was subject to the express condition that the licensee should erect a saw mill or pulp factory to be completed by 1920, also to the conditions of the Act, and that if the licensee should make default in performing "any of the conditions herein contained" the license should be null and void. One of the conditions in the Act was that a licensee was to work the licensed area in a bona fide manner, and operate the mill or factory erected, in each year; but that condition was not set out in the license. The Act, as amended in 1911, provided for forfeiture only for non-payment of rent or royalties; for any breach of the other conditions the licensee was to be liable to a penalty not exceeding $10,000, and a penalty not exceeding $100 for every day the breach continued. By an amending Act of 1918 a breach of any condition was made a cause of forfeiture. The licensee and his assign did nothing under the license except to pay the rent. Rent paid in 1928 was accepted, but was returned later. In 1930 the Crown sued for a declaration that the license was null and void, or was forfeited, and for penalties and damages.

Held, that the license was subsisting, because (1.) the provision that upon relevant default it was to be void was to be treated as making it merely voidable at the option of the Crown; (2.) the words "conditions herein contained" meant the conditions set out, and did not include the incorporated statutory conditions; (3.) the condition set out as to the erection of a mill or factory had been broken once and for all in 1920, and forfeiture on that account had been waived by the acceptance of rent in 1928, and there had not been any later breach of a condition for which there was a right of forfeiture, as the Act of 1918 applied only to licenses issued after it was passed.

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* *Present:* VISCOUNT DUNEDIN, LORD MERRIVALE, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

Held, further, that damages could not be recovered, as there was no contractual obligation by the licensee to perform the conditions, nor daily penalties, as there was no continuing breach; but that, by agreement, the case should be remitted for the trial Court to decide the amount of lump sum penalty to be imposed.

Davenport v. *The Queen* (1877) 3 App. Cas. 115 followed.

Judgment of the Supreme Court of Newfoundland reversed.

CONSOLIDATED APPEAL and CROSS-APPEAL (No. 29 of 1931) from a judgment of the Supreme Court of Newfoundland (June 23, 1930).

The first appellant, George Jardine, was the grantee of a timber license for a period of ninety-nine years over certain lands in Labrador issued on March 16, 1915, under the (Newfoundland) Crown Lands Act, 1903 (3 Edw. 7, c. 6), as amended by the Crown Lands Act, 1911 (1 Geo. 5, c. 15): see Consolidated Statutes of Newfoundland, 1916, c. 129. The first appellant assigned the license to the second appellant, M. E. Martin, on April 1, 1915.

In 1930 the respondents, the Attorney-General for Newfoundland and the Minister of Agriculture and Mines, brought an action in which the Attorney-General claimed a declaration that the license was null and void, and he, or alternatively the Minister, claimed a declaration of forfeiture, damages for breaches of conditions in the license, and pecuniary penalties.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The action was heard by the Supreme Court of Newfoundland (Horwood C.J., Kent and Higgins JJ.), who unanimously declared that the license was forfeited; the grounds of the judgments appear from the present judgment. The claim for damages and penalties was not dealt with by the learned Chief Justice; Kent J. said that there was not evidence before the Court enabling it to deal with the matter, but that he thought there should be a reference to the registrar; Higgins J. thought that damages should not be allowed or penalties imposed.

J. C.
1932
JARDINE
v.
ATTORNEY-GENERAL FOR NEWFOUNDLAND.

The defendants appealed from the declaration of forfeiture, and the plaintiff cross-appealed, claiming damages and penalties.

1931. Nov. 27, 30. *Gavin Simonds K.C.*, *H. A. Winter K.C.* and *J. H. Stamp* for the defendants.

Hon. Geoffrey Lawrence K.C., *W. Monckton K.C.* and *C. A. Pearson* for the plaintiffs.

[In addition to cases mentioned in the judgment reference was made for the appellants to *Quesnel Forks Gold Mining Co.* v. *Ward* (1) and *Rex* v. *Paulson* (2); and for the plaintiffs to *Rumsey* v. *North Eastern Ry. Co.* (3)]

1932. Jan. 12. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The main question involved in this appeal may be shortly stated. It is whether a timber license granted to the appellant Jardine and assigned by him to the appellant Martin (who is a timber merchant) is a subsisting license or has been effectively determined by or on behalf of the Crown. The relevant facts, however, do not admit of brief statement, and must be set forth in some detail.

The license covers a tract of land in Labrador and is dated March 16, 1915. It is expressed to be granted under and subject to the conditions and provisions of the Newfoundland Act (3 Edw. 7, c. 6), and the Acts in amendment thereof, the relevant Acts being the Crown Lands Act, 1903, and the Crown Lands Act, 1911. The license itself contains certain express conditions; but before considering the actual terms of that document it will be convenient to refer to the material provisions of the relevant Acts.

The Act of 1903 contains provisions relating to the grant of licenses to cut timber on Crown lands. By s. 22 the licensee has to pay a bonus, to be fixed by the Governor in Council, varying according to the situation and value of the limit, but in no case less than two dollars per square mile.

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(1) [1920] A. C. 222.

(2) [1921] 1 A. C. 271.

(3) (1863) 14 C. B. (N. S.) 641.

By s. 23 the Governor in Council may grant such licenses for a period of fifty years or such further period as may be deemed necessary. The Act of 1911 repealed this section and substituted for it a section enabling him to grant such licenses for a period of ninety-nine years. Sect. 25 provides that "All licenses shall be issued subject to the following conditions : "—then there follow eight sub-sections. Some of these sub-sections were amended or repealed by the Act of 1911, with the result that s. 25 of the Act of 1903, so far as relevant, ran thus :—

"25. All licenses shall be issued subject to the following conditions :—

(1.) The licensee to erect a saw mill or mills or a factory or factories for the manufacture of paper or paper pulp upon or in connection with the limit described in such license and subject to any special conditions which may be agreed upon and stated in the license, such saw mill or mills to be of the capacity to cut at the rate of one thousand feet board measure in twenty-four hours for every ten square miles comprised in the license, or to establish such other manufactory of wood goods as may be agreed upon as the equivalent of such mill or mills, the licensee to commence and complete the erection of the saw mill or mills or manufactory of wood goods within such period as shall be determined by the Governor in Council and set forth in the license or to expend in the erection and equipment of a factory or factories for the manufacture of paper or paper pulp such sum as shall be prescribed and within such period as shall be limited and stated in such license, and further to work said limit in a bona fide manner and operate said mills or factories during each succeeding year of the term of the license ; provided that the licensee may, with the consent of the Governor in Council, manufacture a greater or less quantity of timber in any year than the quantity specified.

(2.) To take from every tree he cuts down all the timber fit for use, and manufacture the same into sawn lumber or other such saleable products as may be provided in the license or by any regulations made under this Act.

(4.) To make returns to the Government annually on oath, on or before the 30th of November in each and every year of (*a*) the total quantity of timber cut between the 1st day of July and the 30th day of June then last past which is liable to the payment of royalty, and (*b*) of all timber cut for the manufacture of paper or paper pulp, also to make returns annually or at such other periods as may be required by the Governor in Council, or by regulations under this Act, sworn to by him or by his agent or employee, cognizant of the fact, of the quantity of all sawn lumber, timber, railway car stuff, ship timber and knees, shingles, laths, cordwood or bark, or any other product of timber sold or disposed of from the limit in whatever form the same may be sold or disposed of by him during such quarter or other period and the price or value thereof, the licensee to be liable to a fine of fifty dollars if the returns aforesaid be not filed in the Department of Agriculture and Mines within thirty days from the date on which they are required to be filed as aforesaid.

(5.) To pay in addition to the said bonus an annual ground rent of two dollars per square mile, such rent to commence and be computed from the date of the approval of the application by the Governor in Council, and to be paid in advance the first year's rental within thirty days of such approval and to be paid on the total area applied for and approved, and that for subsequent years on the area surveyed and described in the license, on the 30th day of November; and, further, a royalty in all cases, except on lands in Labrador, at the rate of 50 cents per thousand feet, board measure, for all trees cut down, and in Labrador at the rate of 25 cents per thousand feet, board measure, for all trees cut down: Provided that no royalty is to be payable on timber or trees manufactured into paper or paper pulp.

(6.) To keep correct books of such kind and in such form as may be provided by his license, or by regulations under this Act, and to submit the same for the inspection of the Minister of Agriculture and Mines, or a person authorized by him whenever required, for the purpose of verifying his returns as aforesaid.

(8.) The license shall be liable to forfeiture for the non-payment of rent or royalties; and, for the infraction of any of the other conditions to which the said license is subject, the licensee and his assigns shall be liable to a penalty of not more than ten thousand dollars, and a penalty of not more than one hundred dollars for every day any such infraction continues. The said penalty may be recovered by a suit in the name of the Minister of Agriculture and Mines, and shall be a first charge on any and all property that may be upon the land licensed."

In addition, the Act of 1911 enacted (by s. 6 thereof): "Whenever the rent or royalties payable under any license to cut timber shall be in arrears and unpaid for the period of six months from the day on which the same became due, the Governor in Council may, without any suit or other proceeding to enforce the same, declare such license forfeited and thereupon the same shall be again open to application by the public."

These being the relevant statutory provisions which were in force at the date of the issue of the license, the terms of that document now fall to be considered.

The tract covered is 1000 square miles at White Bear Bay, Labrador. The term is ninety-nine years from March 12, 1915. There is a yearly rent of 2000 dollars and a royalty at the rate of 25 cents for every 1000 feet board measure for all trees cut down, payable on November 30 in each and every year during the continuance of the license. Then follows a proviso containing a series of express conditions. It contains nearly all the conditions specified in the amended s. 25 of the Act of 1903, as the conditions subject to which all licenses shall be issued; it does not, however, contain any condition corresponding with the words "and further to work said limit in a bona fide manner and operate said mills or factories during each succeeding year of the term of the license."

The proviso in question (so far as material) runs thus: "Provided and this license is upon the express conditions that the said George Jardine do and shall commence within one year and complete within three years from March 12 aforesaid the erection of a saw mill or mills of a capacity to

J. C.
1932
JARDINE
v.
ATTORNEY-GENERAL
FOR
NEWFOUNDLAND.

cut at the rate of one hundred thousand feet, board measure, in every twenty-four hours, or expend the sum of 50,000 dollars in the erection and equipment of a factory or factories for the manufacture of paper and paper pulp, the erection of such factory or factories to commence within two years, and be completed within five years from March 12 aforesaid; that the said George Jardine shall take and manufacture into sawn lumber or other saleable product all the timber fit for use out of every tree cut down; that the said George Jardine shall at all times prevent all unnecessary destruction of timber on the part of his workmen, and shall exercise strict and constant supervision to prevent the origin and spread of fire; that the said George Jardine shall make true and faithful returns to our Minister of Agriculture and Mines for the time being on or before November 30 in each and every year, upon the oath of the said George Jardine declaring (1.) the total quantity of timber cut between July 1 and June 30 then last past which is liable to the payment of royalty, and (2.) all timber cut for the manufacture of paper or paper pulp, and that the said George Jardine, agent or employee cognizant of the fact shall annually or at such other periods as may be required by the Governor in Council, make true and faithful returns upon oath declaring the quantities disposed of or sold, of all sawn lumber, timber, railway and car stuff, ship timber and knees, shingles, laths, cordwood or bark, or any other product of timber from the limit of this license in whatever form the same way be sold or disposed of during such quarter or other period, and the price or value thereof; the said George Jardine to be subject to a fine of 50 dollars if the returns aforesaid be not filed in the Department of Agriculture and Mines within thirty days from the date on which the same ought to have been, or are required to be filed as aforesaid; and that the said George Jardine shall keep correct books of accounts, which shall be open to inspection of our Minister of Agriculture and Mines, or to such person or persons as may from time to time be appointed by him for the purpose of verifying the returns aforesaid; and, lastly, that the said George Jardine do and shall permit and suffer our Minister of Agriculture and Mines or such person or persons as may, from time to time, be appointed by him for that purpose, when and as often as he or such persons may think fit to enter into and upon the said hereby demised land, and to search, view and inspect, and enquire into the working of such mill or mills, with the view to ascertaining and enquiring as to whether the conditions of this license are truly and properly complied with."

The license in addition contains the following clause, upon which much of the controversy turns: "And it is hereby further declared and agreed upon that this license is granted under and subject to the conditions and provisions of Acts 3 Edw. 7, c. 5, and the Acts in amendment thereof, and the rules and regulations made thereunder in relation to the licensing of timber lands, and in case the said George Jardine shall make default in performance of any of the conditions herein contained, then and in that case this license shall be null and void, and the timber hereby licensed shall revert to us, our heirs and successors."

The facts subsequent to the issue of the license must now be stated. A bonus of 2000 dollars was payable for the license and was paid on March 22, 1915. At the same time there was paid a sum of 2000 dollars for rent for the period ending March 12, 1916. The next payment of rent was made on November 30, 1916, and consisted of a sum of 3360.65 dollars, representing rent from March 12, 1916, to November 30, 1917. Thereafter the rent was treated as payable in advance on every November 30 in respect of the twelve months ending on the following November 30.

The tract of land covered by the license was situate in territory the title to which was, at the date of the license, a matter in dispute between Newfoundland and the Dominion of Canada. Unless and until that dispute was resolved in favour of Newfoundland it was obviously a matter of risk for the licensee to be erecting mills or factories and manufacturing and removing timber under his license. Accordingly, the licensee did nothing except pay his rent to the Crown. Although the time for the erection of the saw mill as required

J. C.
1932
JARDINE
v.
ATTORNEY-GENERAL
FOR
NEWFOUNDLAND.

by the license ran out on March 12, 1918, and the time for the erection of the alternative factory ran out on March 12, 1920, the representatives of the Crown made no complaint. They did not seek to have fresh dates substituted by agreement. Neither did they claim that the license was at an end. On the contrary, they continued to accept without demur payment of the annual rent of 2000 dollars up to and including a payment made on May 25, 1928, which cleared the rent under the license up to November 30, 1928. This payment brought the total amount received by the Crown in respect of bonus and rent under the license to a sum in the neighbourhood of 30,000 dollars.

In the meanwhile the dispute between Newfoundland and the Dominion of Canada had been resolved in favour of Newfoundland, the judgment of this Board having been delivered on March 1, 1927.

On November 5, 1928, the further sum of 2000 dollars was paid for rent, covering the period up to and including November 30, 1929. This seems to have been accepted by the Crown, and a receipt was given by the Department of Agriculture and Mines, dated November 5, 1928, and couched in the following terms: "Received from George J. Jardine per M. E. Martin the sum of 2000 dollars, rent timber limit, in advance one year from November 30, 1928."

So the matter rested until the end of the year 1928, when a change of attitude by the department in regard to this license was revealed. On December 29, 1928, the Minister wrote a letter addressed to George J. Jardine, c/o M. E. Martin. It ran thus: "In accordance with a decision of the Government of this Colony, I return you herewith a cheque for the sum of 2000.00 dollars, being amount sent by you to this department on the 5th day of November last, covering a year's rental in advance on timber limit on Labrador held under license by you. You are aware that the conditions in your license relating to the establishment of a mill or mills in connection with the property have not been carried out. Two years ago the then Government of this Colony, after the decision of the Privy Council defining the limits of what

J. C.
1932
JARDINE
v.
ATTORNEY-GENERAL
FOR
NEWFOUNDLAND.

now constitutes Newfoundland Labrador, decided that, inasmuch as it might reasonably be argued on the part of licensees that the uncertain condition of the title to Labrador rendered it difficult for them to carry out this condition in their licenses, the Government would refrain for two years from taking measures for the cancellation of their licenses on the ground of non-performance of this condition. This period of two years expires on March 1, 1929. Owing to your not having complied with the conditions in relation to the erection of a mill or mills, your license is subject to proceedings for cancellation, and in view of the policy of the Government in favour of such cancellation it is not considered fair to accept from you at present the rental payment covering a period extending beyond March 1, 1929. The amount sent in by you is therefore returned herewith in full, and I have to state that if you will forward a cheque covering rental from November 30, 1928, to March 1, 1929, it will be accepted."

It is to be observed that no intimation had ever been given either to the appellant Jardine or to the appellant Martin of any decision or policy of the Newfoundland Government in relation to this license, or in relation to licenses generally, or of any fresh period in relation to the erection of a mill. In their Lordships' opinion, this letter must be read as a statement by the Minister that the license would terminate on March 1, 1929, in consequence of the failure to perform the conditions contained in the license in relation to the erection of a mill. It was contended that the letter only meant that unless some steps were taken by the licensee before March 1, 1929, to erect a mill, the Crown would apply to the Courts to forfeit the license. Their Lordships cannot so read the letter. The power to forfeit is exercisable by the Crown, not by the Courts. The only part which the Courts can play in that regard is to decide, in case of dispute, whether the power to forfeit has been validly exercised. What the Minister in effect is saying in this letter is this: "You have not carried out the condition in your license relating to the establishment of a mill or mills. After the Privy Council's decision, the Government decided not to exercise its right of forfeiture before March 1, 1929. Owing to your not having erected a mill your license will be cancelled on that date, and we will not accept rent for any period beyond it."

The letter was answered on January 7, 1929, by the legal adviser of the appellant Martin, who disputed that any right to cancel or ground for cancellation existed, and returned the cheque. The rent up to and including November 30, 1930, was sent in November, 1929, but was returned. Ultimately the appellant Martin presented a petition to the Supreme Court of Newfoundland, seeking a declaration that the license was still valid and effectual. Thereupon, on February 20, 1930, the present proceedings were commenced by writ in the said Supreme Court, in which the Minister was plaintiff and the appellants were joined as defendants. Subsequently the Attorney-General was added as a co-plaintiff. The petition of the appellant was stayed.

The relief claimed in this action was thus framed :—

" The plaintiff, the Attorney-General, claims : A declaration that the said license is null and void.

" The plaintiff, the Attorney-General, or, in the alternative, the plaintiff, the Minister of Agriculture and Mines, claims : (*a*) A declaration of forfeiture. (*b*) Damages for breaches of the conditions hereinbefore referred to. (*c*) Pecuniary penalties. (*d*) Such other order as the nature of the case may demand."

The defendants counterclaimed a declaration that no valid cause existed for forfeiture of the license, that the Government was not entitled to re-possess the lands included therein, but that the license was still valid and effectual.

The trial took place before a full bench of the Supreme Court, and by its judgment, dated June 23, 1930, it was adjudged that the license be declared forfeited and that the defendants pay the costs of those proceedings.

It will be observed that no date is assigned as the date on which the forfeiture occurred, and that no relief was granted in respect of the claim for damages or the claim for penalties.

From this judgment both sides have appealed to His Majesty in Council. The defendants complain of the

J. C.
1932
JARDINE
v.
ATTORNEY-GENERAL
FOR
NEWFOUNDLAND.

declaration of forfeiture, while the Attorney-General and the Minister seek to obtain either an order for payment to the Minister of damages to be assessed, or an order for the payment to the Minister of such sums in respect of penalties as may be just. The two appeals were consolidated.

Before dealing with the main appeal their Lordships think it advisable to make certain preliminary observations.

The claim of the plaintiffs is to deprive the defendant Martin, without compensation, of a right for which he has paid very considerable sums. If such a power of forfeiture exists, that defendant cannot complain, but he is entitled to claim that the terms in which the alleged power is framed must be closely scrutinized, and the case must be brought within its exact terms before it can be said that his license has been forfeited thereunder.

Further, if, as is the case here, the licensor has accepted rent with knowledge of breaches of conditions already committed, no forfeiture can take place grounded on any such breaches. The right to forfeit upon those grounds has been for ever waived. A forfeiture subsequent to the last acceptance of rent can only take place by reason of some breach subsequently committed, or (if previously committed) subsequently discovered.

Finally, although the clause in the present license is so framed as to provide that in case of the relevant default "this license shall be null and void," this must be treated as an ordinary forfeiture clause making the license voidable at the option of the licensor, a right which can be effectively waived by him as indicated above: see *Davenport* v. *The Queen*. (1)

Their Lordships now proceed to deal with the main appeal. The conditions of the license, the breaches of which are alleged by the plaintiffs to justify the exercise of the right of forfeiture, are six in number—namely, (1.) The condition as to the erection of a saw mill or saw mills (set out in the license) or manufactory of wood goods (not set out in the license); (2.) the condition as to the erection of a paper or pulp factory (set out in the license); (3.) the statutory condition as to working the limit in a bona fide manner (not set out in the license); (4.) the statutory condition as to operating such mills or factories (not set out in the license); (5.) the condition as to making returns of timber cut (set out in the license); and (6.) the condition as to payment of royalties (set out in the license).

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(1) 3 App. Cas. 115.

As to all these matters the defendants put forward one overriding argument. They contended that upon the true construction of the Acts of 1903 and 1911, and in particular upon the true construction of s. 25, sub-s. 8, of the Act of 1903, the power to grant licenses to cut timber on Crown lands was confined to granting licenses in such a form that the license granted could not be liable to forfeiture for any reason other than the non-payment of rent or royalties. Accordingly, it was argued that the provision in this license which purported to make it null and void in the event of default by the licensee in performance of any of the conditions therein contained, was of no effect in regard to the breach of any condition other than the condition for payment of rent and royalties.

This argument was rejected by the Supreme Court; but by reason of the view which their Lordships have formed upon other aspects of the case, it is unnecessary for them to express any opinion upon the matter. They propose to deal with the case upon the footing that the clause contained in the license confers upon the Crown a valid power to put an end to the license " in case the said George Jardine shall make default in performance of any of the conditions herein contained."

The outstanding feature of this case is the fact that the Crown accepted without demur rent paid year by year, the last of such payments being accepted on November 5, 1928, in respect of the period ending on November 30, 1929. The cheque was cashed and no hint of forfeiture was given until nearly two months later. The effect of this in law is beyond doubt. On November 5, 1928, the Crown recognized the continuing existence of the license and waived any right of forfeiture which then existed by reason of any known breach of condition. No right of forfeiture could arise after November 5, 1928, unless the licensee made some "default in performance of any of the conditions herein contained" which was subsequent to the acceptance of the rent, or had already made some such default which only subsequently became known to the Crown. There is no question here of any unknown antecedent breach being subsequently discovered. The crucial question is whether any subsequent breach was committed; and this, in view of the fact that the licensee continued to do nothing at all except to attempt to pay a further year's rent, must in this case depend upon the question whether the relevant conditions were conditions which, if broken, were broken once and for all, or were conditions of a continuing nature so that the licensee was from the moment of the original breach of a condition continuously committing a breach thereof.

The learned judges in the Supreme Court, although in agreement as to the result of the action, seem to have based their decision that the license was forfeited upon different grounds.

The Chief Justice held that the receipt of rent operated only as a waiver of the time limits provided for in s. 25 of the Act of 1903, and that there were continuing breaches of the conditions that the licensee should work the limit in a bona fide manner and should pay royalties, which breaches conferred an immediate right of forfeiture. It is not quite clear whether or not he thought that there was a continuing condition to erect a saw mill or a factory irrespective of any time limit, which was being continuously broken after the last receipt of rent. Probably he did; but his judgment appears to be based upon a consideration of the terms of the statute rather than upon the wording of the license, and to rest primarily upon there being a continuous breach of the conditions to work the limit and pay royalties.

Kent J. held that there was a continuous obligation to erect and operate continuously a mill or factory and that acceptance of rent was no waiver of the subsequent continuance of the breach of that obligation. By "obligation" the learned judge no doubt meant "condition." He treated each sub-section of s. 25 of the Act of 1903 as an indivisible condition; and upon this footing he held that the provisions of sub-s. 1 form a single condition of a continuing nature—namely, to erect the mill or factory, work the limit and operate the mill or factory, a breach of any portion of which is a continuing breach of the whole. This judgment also seems to be based upon a consideration of the terms of the statute and not the language of the license.

Higgins J. held that the license was properly forfeited by reason of a breach of the continuous condition as to working the limit, which is provided for in the statute; that is to say, that the power of forfeiture arose by reason of breaches of that condition committed after the last receipt of rent. The decision of this learned judge seems to depend wholly upon breach of a condition set out in the statute, but not in the license.

In regard to the view expressed by the Chief Justice that the acceptance of rent amounted only to a waiver of the time limit, it is difficult to see upon what principle this conclusion can be based. In the case of a forfeiture clause, acceptance of rent after a known breach of a covenant or condition is not waiver of the covenant or condition or some part thereof, but waiver of the right to forfeit which has arisen from the breach; and their Lordships feel a difficulty (in the absence of any special circumstances) in attributing to the receipt of rent after notice of breach of a condition, any effect short of a complete waiver of the right to forfeit by reason of that breach. *Counter* v. *Macpherson* (1) is no authority to the contrary. No question of forfeiture arose in that case. The respondent there was under a contract with the appellant to take a lease of property conditionally on the appellant executing certain works upon the property before a certain date. The respondent went into possession after the date, but before the works had been executed. The appellant attempted to get a decree of specific performance before he had executed the works. It was held that he could not get such a decree, because there was no obligation

(1) (1845) 5 Moo. P. C. 83.

on the respondent to take a lease until the works had been executed. The failure to execute the works by the time stipulated might have avoided the contract at law, but the respondent had by his conduct waived his right to object that time was of the essence of the contract; the contract was subsisting in equity, but could only be enforced by the appellant after he had fulfilled the condition of executing the works. That case is no authority for the proposition that acceptance of rent after a known breach of a condition to do an act before a certain date is only a partial waiver, or is anything but a complete waiver of all right of forfeiture which is founded upon that breach.

Nor does the case of *Peterson* v. *The Queen* (1) assist. In that case the acceptance of the money alleged to constitute the waiver was accompanied by a statement which qualified the acceptance and preserved the obligation to execute the works notwithstanding that the time limited had expired.

The problem must, as it appears to their Lordships, be confined in the present case to the question whether the license became forfeitable under the power to forfeit contained in the license. The statutory power of forfeiture is out of the case. It is only available for non-payment of rent and royalties. Non-payment of rent is not and cannot be suggested. The Chief Justice alone relied upon a breach of the condition as to payment of royalties, but in their Lordships' view there could be no breach of this condition unless royalties had in fact become due and payable; and this event never happened. It is true that Kent J. took the view that an amendment made by the Crown Lands Act, 1918, which enacted a new sub-s. 8 to s. 25 of the Act of 1903, applied to the license here in question, with the result that the license became forfeitable under statute on breach of any of the other conditions; but this view is, in their Lordships' opinion, untenable. The new sub-s. 8 could only apply to licenses thereafter issued.

At this stage it will be convenient to dispose of one point in the case, which is not mentioned in the judgments of the

(1) (1889) 2 Can. Ex. R. 67.

Supreme Court. The power of forfeiture contained in the license is exercisable in case of default in performance of "any of the conditions herein contained." According to the natural meaning of these words they only apply to conditions which are contained in the document, and their Lordships feel unable to extend that meaning so as to include conditions which are not in fact contained in the document, but which are only referred to therein. In their opinion, no power of forfeiture exists under the express power conferred by the license unless the condition alleged to be broken is in fact contained in the license, i.e., set out therein.

Further, it must follow from this that the proper matter for consideration is not the meaning and effect of the words used in the statute, but the meaning and effect of the language used in the license. The statute indicates the essential conditions, but it is the license to which one must turn to ascertain the actual terms of the condition or conditions the breach of which is alleged to be the foundation of the forfeiture. It is not and indeed could not be suggested that the conditions expressed in the license are inconsistent with the conditions required by the statute. This being so, the judges in the Supreme Court ought to have addressed themselves to the words of the license.

Turning again to the problem as stated above, it is necessary to consider the six before mentioned conditions, the breaches of which are alleged by the plaintiffs to justify the forfeiture. They must be looked at to see whether any breach of any of them occurred after November 5, 1928.

The first two of these conditions, so far as contained in the license, cover only part of the terms of sub-s. 1 of the amended s. 25—namely, the first part thereof, which ends just before the words "and further." There is no allusion to a wood goods factory in the license at all.

The third and fourth of these conditions are not to be found in the license either. Nowhere in the license is it possible to find a single indivisible condition, as described by Kent J., to erect a mill or factory, work the limit, and operate the mill or factory.

Their Lordships think that upon the true construction of the license the position in regard to the four first of these conditions is this: There are two separate and distinct conditions—namely (1.) a condition that the licensee shall begin and complete before certain dates the erection of a saw mill, with an alternative choice to him of beginning and completing before certain later dates a paper or pulp factory, expending thereon a sum of 50,000 dollars; and (2.) a condition, incorporated by reference from the statute, to work the limit in a bona fide manner and operate the said mill or factory during each succeeding year of the term. This last mentioned condition is one condition the meaning of which, in their Lordships' opinion, is that the limit has to be worked by the operation of the mill or factory to be erected under the earlier condition, and that this working and operation has to be continuous during each year of the term after the completion of the mill or factory. If this be the true meaning of the condition, then no breach occurred after November 5, 1928. As regards the first condition, it was broken once and for all long before that date, and it would be impossible to say that at any time subsequently a breach thereof took place. A man cannot on November 6, 1928, break a condition which requires him to complete an erection before March 12, 1920. As regards the second condition the position of the respondents is even more difficult. It was contended that this second condition could not have been broken after the crucial date because it was dependent on the first, and when the first condition was definitely broken, so also of necessity was the second condition broken once and for all. In support of this contention reliance was placed upon the decision in *Stephens* v. *Junior Army and Navy Stores, Ld.* (1) While their Lordships appreciate that the argument derives great assistance from that authority, they think it unnecessary to come to a decision upon this point. There is a complete answer to any claim to forfeit the license upon the footing of a breach of this second condition in the fact that this condition is not set out in the license, but

(1) [1914] 2 Ch. 516.

applies only by reason of the statute, and therefore does not form one of "any of the conditions herein contained."

As regards the fifth condition hereinbefore set out, this clearly carries the matter no further, and as regards the condition as to payment of royalties, there can have been no breach of this condition because, as already pointed out, no royalties ever in fact became payable.

The result is that the main appeal succeeds because so far as the alleged right to forfeit was based upon failure to erect a saw mill or factory, the condition in this behalf contained in the license was broken once and for all long before November 5, 1928, and there was not and could not be a subsequent breach thereof; because so far as it was based upon failure to work the limit in a bona fide manner, the condition in this behalf was not contained in the license; because so far as it was based upon failure to operate such mill or factory, the condition in that behalf was not contained in the license; and because so far as it was based on the failure to make returns of timber cut and pay royalties, no returns ever became due to be made and no royalties ever became payable.

The cross-appeal remains to be considered. There can be no claim to relief by way of damages, because there is no contractual obligation by the licensee to fulfil any of the conditions. The only possible remedies for breach of any of the conditions to which the license is subject are (*a*) forfeiture and (*b*) penalties.

The question of forfeiture has been dealt with on the main appeal. In regard to penalties, these are not affected by the acceptance of rent. The right to them depends upon s. 25, sub-s. 8, of the Act of 1903, which was left untouched by the Act of 1911. Two penalties are there mentioned—namely, a penalty of not more than 10,000 dollars and a penalty of not more than 100 dollars "for every day any such infraction continues." This latter penalty does not appear applicable to a case such as the present, where the breach is a single breach and not a continuing breach. The Crown's right to penalties seems accordingly restricted to the recovery of a penalty not exceeding the named amount. It is not easy to see upon what principles the amount is to be fixed; nor does the section contain any indication of this or of the authority by whom the amount shall be ascertained. The parties, however, have agreed that the question and amount of the penalty shall be decided by the Court in the action, the licensee being at liberty to raise such points by way of defence to or in reduction of the claim to penalties as he may be advised.

It occurs to their Lordships to make one general observation. It was urged that a decision which left the license subsisting with no further burden upon the licensee in the future than the payment of the annual rent might result in this timber tract remaining unworked for the residue of the license term. As to this, it is to be noted that this is the exact state of affairs contemplated by s. 25, sub-s. 8, of the Act of 1903, which remained unrepealed until 1918. But their Lordships cannot but think that the necessity of paying an annual rent of so substantial an amount as 2000 dollars (in addition to some 30,000 dollars already disbursed) will be found in practice to be sufficient incentive to the enterprise of the licensee.

For the reasons given their Lordships are of opinion that an order should be made on the consolidated appeals discharging the judgment of the Supreme Court dated June 23, 1930, and substituting therefor an order (1.) declaring that the license is a subsisting license, and that the plaintiffs are not nor is either of them entitled to recover any damages, (2.) adjourning the further hearing of the action in relation to the claim for penalties, (3.) ordering the plaintiffs to pay the costs of the proceedings up to and including the order of June 23, 1930, and (4.) giving liberty to the parties to apply. This will enable all proper applications to be made to the Supreme Court concerning the further hearing of the action in relation to penalties, the costs of which will be dealt with by the Supreme Court in due course. Any costs already paid under the original judgment will be repaid. The plaintiffs in the action will pay the costs of the consolidated appeals. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for defendants: *Allen & Overy.*

Solicitors for plaintiffs: *Burn & Berridge.*

[PRIVY COUNCIL.]

J. C.*
1932
Jan. 25.

REGENT TAXI AND TRANSPORT COMPANY, LIMITED . . . . . APPELLANTS;

AND

CONGRÉGATION DES PETITS FRÈRES DE MARIE . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Prescription of Action—Negligence—Bodily Injuries—Action for Damages—Injuries to Third Person—Medical Expenses and Loss of Services—Civil Code, art. 2262 (2).

The respondents were a religious community, incorporated by a Quebec statute and bound by rules to maintain its members; the members, by their vows, owned no property, everything acquired by them vesting in the community. A member of the community sustained serious bodily injuries by the negligence of the appellants' servant. More than one year after the accident the respondents brought an action in the Courts of the Province against the appellants claiming damages in respect of disbursements for medical attendance and loss of the member's services. By art. 2262 (2) of the Civil Code an action "for bodily injuries" is prescribed for one year subject to exceptions. If the action was not prescribed by art. 2262 (2) it was within time under art. 2261.

Held, that the action was barred, as having regard to the exceptions to art. 2262 (2), it could not be construed as applying only where the bodily injuries had been sustained by the person suing. Upon the facts the respondents were under a legal obligation to make the disbursements claimed, but as the suit was barred it was not necessary to determine whether they had a right of suit under the Civil Code.

Judgment of the Supreme Court of Canada [1929] S. C. R. 650 reversed.

APPEAL (No. 17 of 1930) by special leave from a judgment of the Supreme Court of Canada (November 4, 1929) affirming, with a reduction of damages, a judgment of the Court of King's Bench of the Province of Quebec (December 21, 1928) which affirmed a judgment of the Superior Court at Montreal.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and SIR GEORGE LOWNDES.

J. C.
1932
REGENT TAXI AND TRANSPORT, LD. v. PETITS FRÈRES DE MARIE.

The respondents, a religious community, brought an action in the Superior Court against the appellants alleging that a member of the community had sustained bodily injuries by reason of the negligence (faute) of the appellants' servant, and claiming as damages disbursements for medical attendance and care, and for loss of the member's services. The action was brought more than a year after the date when the bodily injuries were sustained.

Upon the present appeal only two questions arose—namely, (1.) whether the action could be maintained by the respondents under the Civil Code of Quebec; (2.) whether the action was barred by prescription under art. 2262 (2) of the Code, it being conceded that if that article did not apply the action was brought in time under art. 2261.

The Supreme Court of Canada by a majority (Anglin C.J., Lamont and Smith JJ.), affirming the lower Courts, decided both the above questions in favour of the respondents, but disallowed their claim in respect of loss of services. Mignault and Rinfret JJ. dissented, holding that the respondents had no right of action under the Civil Code. The appeal is reported at [1929] S. C. R. 650.

The facts appear more fully from the judgment of the Judicial Committee, in which are set out the material provisions of the Civil Code.

1931. Dec. 21, 22. *Geoffrion K.C.* for the appellants.

Sir Boyd Merriman K.C. and *Frank Gahan* for the respondents.

The arguments were directed to the effect of the material provisions of the Civil Code, and appear from the judgments delivered in the Supreme Court, an additional argument for the appellants upon the first question being mentioned in the judgment here reported.

1932. Jan. 25. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. This appeal, brought by special leave from a judgment of the Supreme Court of Canada,

J. C.
1932
REGENT TAXI AND TRANSPORT, LD.
v.
PETITS FRÈRES DE MARIE.

involves two important questions arising under the Civil Code of the Province of Quebec, upon one of which an acute division of judicial opinion was disclosed in the Supreme Court.

The respondents are a religious community, incorporated by a Quebec statute, and bound by rules to maintain in sickness and in health its members who, by their vows, own no property, everything acquired by them vesting in the community. One of the members was Brother Henri-Gabriel who was mainly engaged in the writing of textbooks and the teaching of boys.

On August 14, 1923, while travelling in a motor omnibus driven by a servant of the appellants, Brother Henri-Gabriel sustained serious bodily injuries by reason of the "faute," or "fault" of the driver.

The community thereby lost his services and were put to expense for his treatment and care, the actual disbursements amounting to a sum of $2236.90.

Brother Henri-Gabriel (who died on March 26, 1927) brought no action in respect of his injuries; but on August 7, 1925, the community sued the appellants claiming from them damages, which included the disbursements, amounting to nearly $15,000. This action was tried in the Superior Court in Montreal by Fabre-Surveyer J., who, by his judgment, dated February 10, 1928, awarded to the community $4000 by way of damages composed of the amount of the said disbursements and a sum for loss of services.

As will appear, the judgment of the Supreme Court of Canada reduced the damages to the sum of $2236.90, by disallowing any claim for loss of services. Against this reduction the community have not appealed. Such disallowance must therefore, in any event, stand.

The two questions in dispute which survive are, (1.) whether any cause of action accrued to the community, and (2.) whether any such cause of action was barred after one year.

At this point it will be convenient to set out the relevant provisions of the Code under which these questions arise: and since nothing turns upon a consideration of the respective

J. C.
1932

REGENT TAXI AND TRANSPORT, LD. v. PETITS FRÈRES DE MARIE.

texts it will suffice to give the English version. They are as follows:—

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care;

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

Tutors are responsible in like manner for their pupils;

Curators or others having the legal custody of insane persons, for the damage done by the latter;

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses.

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

J. C.
1932
REGENT TAXI AND TRANSPORT, LD. v. PETITS FRÈRES DE MARIE.

These actions are independent of criminal proceedings to which the parties may be liable and are without prejudice thereto.

2261. The following actions are prescribed by two years:

1. For seduction, or lying-in expenses;

2. For damages resulting from offences or quasi-offences, whenever other provisions do not apply;

3. For wages of workmen not reputed domestics and who are hired for a year or more;

4. For sums due schoolmasters, and teachers, for tuition, and board and lodging furnished by them.

2262. The following actions are prescribed by one year:

1. For slander or libel, reckoning from the day that it came to the knowledge of the party aggrieved;

2. For bodily injuries, saving the special provisions contained in art. 1056 and cases regulated by special laws.

3. For wages of domestic or farm servants, merchants' clerks and other employees who are hired by the day, week or month, or for less than a year;

4. For hotel or boarding-house charges.

While it was not disputed that Brother Henri-Gabriel, as the immediate victim of the bodily injury, could have sued under art. 1053 to recover such damages as he had sustained, it was claimed by the community, but denied by the appellants, that the community had under the same article a right (separate from and independent of the right of the Brother) to sue and recover such damages as the community had sustained. It was further claimed by the community that their right of action was not an action "for bodily injuries" within art. 2262, which would be prescribed by one year, but fell within art. 2261 as being an action "for damages resulting from offences or quasi-offences" to which no other provisions applied, which was prescribed by two years. The appellants contended that the action, if maintainable, fell within art. 2262, with the result that it was out of time and should have been dismissed.

The trial judge held that the community had a cause of action, and that their action fell within art. 2261 (2) and was not barred.

An appeal by the present appellants to the Court of King's Bench for the Province of Quebec (Appeal Side) was dismissed. Greenshields J. held that the community had a right of action under art. 1053 which had not become barred. Dorion, Bernier, Cannon and Cousineau JJ. all agreed with this view.

On appeal to the Supreme Court of Canada that Court, by a majority, varied the judgment in favour of the community by reducing the amount of damages to $2236.90, and subject to that modification dismissed the appeal.

The Chief Justice of Canada was of opinion that the community had a cause of action under art. 1053. As regards the question of limitation, he thought that the action by the community, being a distinct action from the action which could be maintained by the person who actually sustained the bodily injuries, was not an action "for bodily injuries" within art. 2262 (2) which words, he considered, should not be read as meaning "for damages resulting from bodily injuries." It fell within art. 2261 (2). Lamont J. in a separate judgment took the same view upon both points. Smith J. simply expressed his concurrence with the Chief Justice.

Mignault and Rinfret JJ. dissented, and held that the community had no cause of action under art. 1053. Their judgments contained no express statement of what their views as to limitation would have been if they had thought that a cause of action did exist in the community.

In the argument before their Lordships the appellants raised a further contention based upon the special relationship between Brother Henri-Gabriel and the community of which he was a member. The contention was that even if both the main questions could be decided against the appellants, nevertheless the appeal should succeed upon the grounds that the community was under no legal obligation to make any of the disbursements comprised in the amount of $2236.90, that the payments by the community were entirely voluntary, and that therefore the community had suffered no damage for which they could sue. In support of this view reliance was placed upon art. 1667 of the Code which it was said disabled the Brother from binding himself to the community for life, and therefore precluded the existence of any legal obligation to maintain him. It runs thus: "1667. The contract of lease or hire of personal service can only be for a limited term or for a determinate undertaking. It may be prolonged by tacit renewal."

As a result of a full argument before the Board their Lordships have formed clear views upon two of the contentions advanced by the appellants, which they now proceed to state.

In regard to the point last mentioned their Lordships feel no doubt upon the facts that a legal obligation rested on the community to make the payments in question, and that consequently the further contention raised before them cannot prevail. They are content to adopt what was said by Dorion J. in the following passage from his judgment (1): "Or le frère Gabriel était lié par un voeu envers l'intimée, à qui il devait son temps et son travail, et celle-ci était également liée envers le frère, à qui elle devait en retour la nourriture, le logement et l'entretien. Sans doute, on ne peut engager ses services que pour un temps limité. (Civil Code, art. 1667.) Mais il ne s'agit pas ici d'un louage de services. Il s'agit d'un engagement sui generis que la loi ne sanctionne peut-être pas par une action directe, mais dont elle reconnaît l'existence et qu'elle légalise en accordant une charte corporative à l'institution dont les voeux de religion sont le moyen de recrutement et la condition d'existence."

Nor do their Lordships feel any doubt in regard to the question whether the cause of action (if any) vested in the community under art. 1053 had become barred. This point arises for consideration upon the assumption that the community have under art. 1053 a right to recover by action the damage caused to them by the fault of the appellants' driver, i.e., by the driver's tortious act in wrongfully inflicting bodily injuries upon Brother Henri-Gabriel.

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(1) Q. R. 46 K. B. 98.

Such an action obviously must fall either under art. 2261 (2) or art. 2262 (2). The question which is the appropriate provision depends for its answer upon the true construction of art. 2262; for if upon its true construction that article includes such an action, then there is no scope for the application to that action of art. 2261 (2).

The words in art. 2262 (2) "for bodily injuries" cannot, their Lordships think, be read literally as they stand. There is no action *for* bodily injuries in the literal sense of those words. A man sues for his wages, but he does not sue for bodily injuries; he sues to recover the damages which he has sustained from the wrongful infliction of bodily injuries. Art. 2262 (2) must accordingly be read as if it referred to an action brought to recover damages sustained from the wrongful infliction of bodily injuries. Such a construction might (if the words "for bodily injuries" stood alone) still leave open the view that the only action referred to in art. 2262 (2) is an action brought to recover damages sustained from the wrongful infliction of bodily injuries upon the plaintiff in the action. But this view is, in their Lordships' opinion, rendered untenable by the words which follow—namely, "saving the special provisions contained in art. 1056." This reference to art. 1056 can only be made for the purpose of ensuring that the one year mentioned in art. 1056 shall prevail over the one year mentioned in art. 2262, thus showing that in the view of the framers of the Code the words "actions for bodily injuries" in art. 2262 would, of their own force, include an action the plaintiff in which was not the person upon whom the bodily injuries had been inflicted.

From this it follows that the present action, being an action to recover damages caused to the community by the wrongful infliction of bodily injuries upon the Brother, is an action for bodily injuries within the meaning of art. 2262 (2) and was "prescribed by one year" under that article. Indeed, it would be strange if it were otherwise; for the result then would be (still upon the hypothesis that the community has a right of action under art. 1053)

J. C.
1932
Regent Taxi and Transport, Ld.
v.
Petits Frères de Marie.

that in the case of a wrongful infliction of bodily injuries, the physical victim must sue within one year while third parties may take twice as long before asserting their claims. Their Lordships find it impossible to suggest any plausible reason why this should be so. If any difference in the periods of limitation should be made between the two plaintiffs, they would have expected to find the respective positions reversed.

For these reasons their Lordships are of opinion that the community's action should in any event have been dismissed as being " prescribed by one year " under art. 2262 (2).

Their Lordships having come to this clear opinion upon this part of the case, feel grave doubts as to the advisability or propriety of expressing any opinion upon the remaining question. The importance of that question admits of no doubt, and its difficulty is apparent in the division of judicial opinion; but, unfortunately, any view which their Lordships have formed (and whether clearly or otherwise) would involve no decision upon the point, for the case is determined in any event by the date on which the proceedings were commenced.

In these circumstances would it be advisable or proper that a view, unnecessary to the decision of the case, should be expressed upon so vexed a question? Their Lordships think not. They are of opinion that no opinion should be expressed by their Lordships upon the question until it comes before them upon an appeal in which they can deal with it as the sole factor for consideration, unhampered by any other competing question which would be decisive of the case.

But for the special terms to which the appellants submitted when leave was given to appeal from the judgment of the Supreme Court of Canada, it would be necessary to provide for the repayment by the community of the damages and costs awarded to them. The appellants, however, have submitted " to pay forthwith the damages and costs awarded to the respondents in the Courts below the same in no event to be recoverable and to pay the respondents'

J. C.
1932
REGENT TAXI AND TRANSPORT, LD. *v.* PETITS FRÈRES DE MARIE.

cost of the appeal in any event." Their Lordships were informed that the damages and costs awarded below had all been paid. In these circumstances it will not be necessary to do more than to discharge the orders made in the Courts below and to substitute for the judgment of February 10, 1928, an order that the action be dismissed.

Their Lordships will therefore humbly advise His Majesty that an order should be made allowing the appeal, discharging the orders in the Courts below and dismissing the action, but providing that nothing already paid by the appellants to the respondents shall be recoverable. The appellants will pay the respondents' costs of this appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1932
Feb. 9.

In re REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Radio Communication—International Convention—Absence of Treaty by British Empire—Matter of National Importance—Telegraphs—Works and Undertakings connecting Provinces—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91; *s.* 92, *head* 10 (*a*); *s.* 132.

The Parliament of Canada has exclusive legislative power to regulate and control radio communication in Canada.

Great Britain, Canada (and other Dominions and Colonies) having entered separately into a convention on the subject with foreign countries, the Parliament of Canada, under the general powers conferred upon it by s. 91 of the British North America Act, 1867, to make laws for the peace, order, and good government of Canada, had in relation to the obligations under the convention power similar to that which it would have had under s. 132 if the convention had been a treaty between the British Empire as an entity and foreign countries. The legislative power of the Dominion extended to inter-provincial radio communication on the same grounds that it extended to inter-provincial aeronautics, and because the matter was within "telegraphs" and "works and undertakings connecting the Provinces with any other, etc.," subjects which s. 92, head 10 (*a*), excepted from the authority of the Provincial legislatures, and s. 91, head 29, brought within the Dominion authority.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD MERRIVALE, LORD RUSSELL OF KILLOWEN, and SIR GEORGE LOWNDES.

In re Regulation and Control of Aeronautics in Canada p. 54 ante applied.

Observation in *City of Montreal* v. *Montreal Street Ry. Co.* [1912] A. C. 333, 342 discussed.

Judgment of the Supreme Court of Canada [1931] S. C. R. 541 affirmed.

APPEAL (No. 84 of 1931) by special leave from a judgment of the Supreme Court of Canada (June 30, 1931) in answer to questions referred to that Court by the Governor-General of Canada in Council under s. 55 of the Supreme Court Act of Canada.

The two questions referred are set out in the judgment of the Judicial Committee. Shortly stated they were: (1.) Has the Parliament of Canada jurisdiction to regulate and control radio communication? (2.) If not, in what particulars is the jurisdiction limited?

The majority of the Supreme Court (Anglin C.J., Newcombe and Smith JJ.) answered the first question in the affirmative and returned no answer to the second. Rinfret and Lamont JJ. dissented, being of opinion that the jurisdiction was not complete or exclusive, but was limited in the particulars appearing from their respective judgments. The proceedings in the Supreme Court are reported at [1931] S. C. R. 541.

The International Radiotelegraph Convention, 1927, and the regulations annexed thereto, is set out in the Appendix to the record in the present appeal at pp. 80 to 136. As appears from the preamble to the convention it was concluded between the Governments of about eighty countries there named. These included Great Britain, the Dominion of Canada and other Dominions, British India, various colonies, also numerous foreign countries. The representatives of Canada were appointed by the Governor-General in Council, and with the other signatories were described in the preamble as "the plenipotentiaries of the countries named."

J. C.
1932

THE REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re.*

By art. 2 of the convention: "(1.) The contracting Governments undertake to apply the provisions of the present convention in all radiocommunication stations established or operated by the contracting Governments, and open to the international service of public correspondence. . . . . (2.) They undertake, in addition, to adopt or to propose to their respective legislatures the measures necessary to impose the observance of the provisions of the present convention and the regulations annexed thereto upon individual persons and enterprises authorized to establish and operate radiocommunication stations for international service, whether or not the stations are open to public correspondence."

The convention and regulations were ratified and confirmed on behalf of His Majesty's Government in Canada by an instrument, dated July 12, 1927, and signed by the Secretary of State for External Affairs, Canada, which stated that the convention had been "signed by the representatives of His Majesty's Government in Canada and of the other Governments specified therein." They were ratified and confirmed on behalf of His Majesty's Government in Great Britain by an instrument in the same form signed by the Secretary of State for Dominion Affairs.

In 1929 a treaty was effected, by exchange of notes, between the Governments of Canada, the United States, Cuba, and Newfoundland relative to the division between those countries of channels of radio communication, and a further agreement on the subject was in negotiation between Canada and the United States.

Radio was stated to be used in Canada for the following, among other purposes: (*a*) coastal stations for communication with ships; (*b*) coastal direction-finding stations and radio beacons, operated by the Minister of Marine; (*c*) public and private licensed stations; (*d*) for national defence and dealing with forest fires; (*e*) licensed broadcasting stations; (*f*) licensed receiving sets, of which there were nearly half a million.

The revenue collected by the Dominion for fees for licences for the fiscal year 1930–31 (nine months), was $479,488.

The Parliament of Canada dealt with the subject by the Radiotelegraph Act (R. S. Can., 1927, c. 195), and Regulations made thereunder.

1931. Dec. 11, 14, 15. *Geoffrion K.C.* and *Pritt K.C.* for the Attorney-General for Quebec, appellant; *Frank Gahan* for the Attorney-General for Ontario, intervener, adopting their arguments. *In re Regulation and Control of Aeronautics in Canada* (1) does not apply. It was decided mainly upon the ground that upon that subject there was a treaty between the British Empire and foreign countries, and that by the terms of s. 132 of the British North America Act, 1867, the Parliament of Canada had authority to perform the obligations under a treaty of that kind. In the present case there was no treaty entered into by the British Empire as an entity and binding upon Canada as a constituent member. Canada was separately represented, and its Government contracted with the other signatories, including Great Britain, as a principal. Further, the treaty in relation to aeronautics covered substantially the whole subject, but the present convention was much less comprehensive. It dealt principally with radio in relation to navigation and with interference, matters which the appellant concedes were within the Dominion authority. The appellant does not dispute the Dominion right to deal with such matters involved as come directly within the enumerated heads of s. 91. There are, however, parts of the subject which are wholly within the Provincial power as to property and civil rights, for instance, the control of broadcasting for educational purposes and as to programmes, especially as to the language used. It is true that broadcasting in one Province may be listened to in another Province, but so also a newspaper published in one Province can be read in others. The fact that broadcasting in one Province may interfere with broadcasting in another does not give the Dominion legislative power over the matter. Apart from specific heads of s. 91 the Dominion has no legislative power over property. A subject need not

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(1) p. 54 ante.

J. C.
1932

THE REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re.*

be wholly within one Province in order to fall within its powers under s. 92, head 13. Inconvenience arising from leaving the Provinces to deal with the matter by combination is no ground for holding that it is within the legislative power of the Dominion: *City of Montreal* v. *Montreal Street Ry. Co.* (1) Even if transmitting instruments are within the Dominion power, receiving sets are not; they are property operating wholly within a Province. Although "telegraphs" in s. 92, head 10 (*a*), have been held to include telephones, the word cannot be extended to include radio communication. The "works and undertakings" referred to by that head are physical things, not services: *City of Montreal* case. (2) Under s. 92, head 10 (*c*), the Dominion has power to bring within its legislative authority any broadcasting station if that is to the advantage of Canada; that power supplies every safeguard necessary.

Tilley K.C. (with him *Varcoe K.C.*) for the Attorney-General for Canada, respondent; *Brooke Claxton K.C.* for the Canadian Radio League, interveners and respondents. This matter is in substance covered by the judgment of the Board in reference to aeronautics. (3) As was there held with regard to aeronautics, radio communication is a matter of national interest and importance, and is a class of subject which affects the body politic of the Dominion; it is moreover a matter as to which there must be a single legislative authority throughout Canada. The change of method in making treaties binding upon the Dominion does not affect the scope of s. 132, or take away the authority thereby conferred upon the Parliament of Canada to perform the obligations arising thereunder. But even if s. 132 does not in terms apply to the international convention here in question, the Parliament of Canada had similar authority under the power conferred upon it by s. 91 to make laws for the peace, order, and good government of Canada as the matter was one of national importance, and not within s. 92. Even if, in certain aspects, the matter falls within

(1) [1912] A. C. 333, 346.
(2) [1912] A. C. 333, 342.
(3) pp. 54, 77 ante.

property and civil rights in the Provinces, the final words of s. 91 exclude Provincial authority, as the matter as a whole comes within s. 91, head 2 (regulation of trade and commerce): *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (1); *Great West Saddlery Co.* v. *The King.* (2) For the purpose of the present question there no valid distinction can be drawn between receiving and transmitting instruments. The authority of the Parliament of Canada extends to inter-Provincial radio on the same grounds that it was held to extend to inter-Provincial aeronautics. Further, that matter comes within "telegraphs", also "works and undertakings connecting the Province with any other, etc.," subjects which s. 92, head 10 (*a*), removes from Provincial authority, and s. 91, head 29, makes enumerated heads of s. 91. There is a joint system of radio communication, and that brings the matter within the words as to "works and undertakings": *Luscar Collieries* v. *McDonald* (3); *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (4) In the *City of Montreal* case (5) there was no joint system. The powers of the Provincial legislature under s. 92 do not enable it to exclude the powers of the Dominion legislature under s. 91: *Dobie* v. *Temporalities Board* (6); *Royal Bank of Canada* v. *The King* (7); *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction.* (8)

Geoffrion K.C. in reply. If the Parliament of Canada has legislative authority to perform the obligations of the convention, although it was not a treaty by the British Empire, s. 132 of the Act of 1867 was superfluous. There is only one case in which a subject assigned to the legislative authority of the Provinces can be brought within the general power of the Dominion legislature, and that is where an emergency exists, and here there was none: *In re Board of Commerce Act, 1919.* (9)

(1) [1896] A. C. 348.
(2) [1921] 2 A. C. 91.
(3) [1927] A. C. 925.
(4) [1905] A. C. 52.
(5) [1912] A. C. 333.
(6) (1882) 7 App. Cas. 136.
(7) [1913] A. C. 283.
(8) [1931] S. C. R. 357.
(9) [1922] 1 A. C. 191.

J. C.
1932

THE REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re.*

1932. Feb. 9. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is an appeal from a judgment of the Supreme Court of Canada, answering questions referred to it by His Excellency the Governor-General in Council, for hearing and consideration, pursuant to the authority of s. 55 of the Supreme Court Act (R. S. Can., 1927, c. 35), touching the jurisdiction of the Parliament of Canada to regulate and control radio communication.

The questions so referred were as follows :—

" 1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed ?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited ? "

The answers of the Chief Justice and the other judges of whom the Court was composed were as follows :—

" The Chief Justice : Question No. 1. In view of the present state of radio science as submitted. Yes. Question No. 2. No answer.

Newcombe J. : Question No. 1. Should be answered in the affirmative. Question No. 2. No answer.

Rinfret J. : Question No. 1. Construing it as meaning 'jurisdiction in every respect' the answer is in the negative. Question No. 2. The answer should be ascertained from the reasons certified by the learned judge.

Lamont J. : Question No. 1. Not exclusive jurisdiction. Question No. 2. The jurisdiction of Parliament is limited as set out in the learned judge's reasons.

Smith J. : Question No. 1. Should be answered in the affirmative. Question No. 2. No answer."

The learned Chief Justice and Rinfret J. expressed their regret that at the time of delivering judgment they had not had the advantage of knowing what was the conclusion reached by this Board on the question referred as to aviation.

It is however unnecessary to speculate as to what would have been the result had the learned judges known as we know now that the judgment of this Board (*In re Regulation and Control of Aeronautics in Canada* (1), delivered on October 22, 1931) settled that the regulation of aviation was a matter for the Dominion. It would certainly only have confirmed the majority in their opinions. And as to the minority, though it is true that reference is made in their opinions to the fact that as the case then stood aviation had been decided not to fall within the exclusive jurisdiction of the Dominion, yet had they known the eventual judgment it is doubtful whether that fact would have altered their opinion. For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries." And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.

Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words the

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(1) p. 54 ante.

J. C.
1932

THE REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re.*

argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the convention with general regulations appended being signed at Washington on November 25, 1927, by the representatives of all the powers who had taken part in the conference, and this convention was ratified by the Canadian Government on July 12, 1928.

The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

At the same time, while this view is destructive of the view urged by the Province as to how the observance of the international convention should be secured, it does not, they say, dispose of the whole of the question. They say it does not touch the consideration of inter-Provincial broadcasting. Now, much the same might have been said as to aeronautics. It is quite possible to fly without going outside the Province, yet that was not thought to disturb the general view, and once you come to the conclusion that the convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the aviation case which might be literally transcribed to this. The idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject. The same might at least very easily be said on this subject, but even supposing that it were possible to draw a rigid line between inter-Provincial and Dominion broadcasting, there is something more to be said. It will be found that the argument for the Provinces really depends on a complete difference being established between the operations of the transmitting and the receiving instruments. The Province admits that an improper use of a transmitting instrument could by invasion of a wave-length not assigned by international agreement to Canada bring into effect a breach of a clause of the convention. But it says this view does not apply to the operation of a receiving instrument. Now it is true that a dislocation of a receiving instrument will not in usual cases operate a disturbance beyond a comparatively limited circular area; although their Lordships understand that a receiving instrument could be so manipulated as to make its area of disturbance much larger than what is usually thought of.

But the question does not end with the consideration of the convention. Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91, and the exceptions runs that the works or undertakings are to be other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province; (*b*) Lines of steamships between the Province and any British or foreign country; (*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces. Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (*a*) within both the word "telegraphs" and the general words "undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

Their Lordships cannot but think that much of the argument depends on an unwarranted deduction taken from a sentence to be found in the judgment delivered by Lord Atkinson in the case of *City of Montreal* v. *Montreal Street Ry. Co.* (1) His Lordship, after saying "the matters thus transferred are . . . . ," quotes the sections (*a*) (*b*) and (*c*) and then adds: "These works are physical things, not services." Mignault J. in the aviation case assumed that this sentence applied not only to (*c*) which deals with "works" only, but also to (*a*) and (*b*), and this view has obviously influenced the conclusions of the minority in this case. Now in the first case their Lordships see no reason why the word "works" should not be referred to the same word standing alone in (*c*) and not be extended to (*a*) where it is conjoined with "undertaking," and to (*b*) where it is not used at all. But if their Lordships' surmise as to the view of the Board as expressed by Lord Atkinson is wrong, then they are not bound by and would not agree with the widened proposition. In the wider sense it was in no way necessary for the judgment in the case. What was being dealt with was a street railway which in itself formed no part of a through system and only became so by the legislation which was impugned. "Undertaking" is not a physical thing, but is an arrangement under which of course physical things are used.

Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province." But further, as already said, they think broadcasting falls within the description of "telegraphs." No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph," as given in the Oxford Dictionary, is: "An apparatus for transmitting messages to a distance, usually by signs of some kind." Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. Further, the strict reading of the word "telegraph," making it identical with the ordinary use of it, has already been given up in *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (1)

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(1) [1912] A. C. 333, 342.

There are several words of Lord Macnaghten in delivering the judgment of the Board in that case which mutatis mutandis might well be applied to the argument of the Province here. He said (2): "It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the Company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places." Now it is true that that case was dealing with an established system, while the question here is as to the scope of legislation. But none the less the argument for the appellants there was that the legislation under which the system had been established was ultra vires. Consequently the words of Lord Macnaghten do

(1) [1905] A. C. 52.

(2) [1905] A. C. 59.

J. C.
1932
THE REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re.*

carry a lesson as to the futility of trying to split what really is one undertaking into two.

As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley —namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "property and civil rights," or within "matters of a merely local or private nature."

Upon the whole matter, therefore, their Lordships have no hesitation in holding that the judgment of the majority of the Supreme Court was right, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. No costs will be awarded, this being a question to be decided between the Dominion and the Provinces.

Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency.

Solicitors for appellant; and for respondent, the Attorney-General for Ontario: *Blake & Redden.*

Solicitors for respondent, the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for respondents, Canadian Radio League: *Dehn & Lauderdale.*

[PRIVY COUNCIL.]

J. C.* 1932 Feb. 4.

J. F. LYMBURN AND ANOTHER . . . APPELLANTS;

AND

A. H. MAYLAND AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada (Alberta)—Legislative Power—Prevention of Fraud—Official Investigations—Dominion Companies—Criminal Law—Security Frauds Prevention Act, 1930 (20 *Geo.* 5, *c.* 8; *Alb.)—British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.

The Security Frauds Prevention Act, 1930, of Alberta, provided that no person might trade in securities unless he was registered with the approval of the Attorney-General; a corporation could be registered, and in that case its officials did not need registration. In effect the Act precluded a public company from selling its shares unless it did so through a registered person or was itself registered. By s. 9 the Attorney-General, or his delegate, could examine any person or company to ascertain whether any "fraudulent act," which was very widely defined, had been, was being, or was about to be, committed. The Act imposed penalties for breaches of its provisions, and by s. 20 made it an offence to commit any "fraudulent act" not punishable under the Criminal Code of Canada.

Held, that the Act was within the scope of the powers of the Provincial legislature under s. 92 of the British North America Act, 1867. It was not invalid in relation to Dominion companies, as it did not wholly preclude them from selling their shares unless they were registered, but merely subjected them to competent provisions applying to all persons trading in securities. Nor was it, as a whole, a colourable attempt to encroach upon the legislative power of the Dominion as to the criminal law; so far as s. 20 was invalid as so encroaching it was clearly severable.

Att.-Gen. for Manitoba v. *Att.-Gen. for Canada* [1929] A. C. 260, and cases there applied, distinguished.

Judgment of the Supreme Court of Alberta, 25 Alb. L. R. 310, reversed.

APPEAL (No. 58 of 1931) from a judgment of the Supreme Court of Alberta, Appellate Division, delivered on April 23, 1931.

The appeal related to the validity of the Security Frauds Prevention Act, 1930 (Statute of Alberta, 20 Geo. 5, c. 8).

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and SIR GEORGE LOWNDES.

The material provisions of the Act, and the circumstances giving rise to the litigation, appear from the judgment of the Judicial Committee.

The first appellant was the Attorney-General for Alberta. The Attorney-General for Canada intervened in the appeal by leave.

The judgment appealed from was upon a motion for an interim injunction referred to the Appellate Division by a judge of the Supreme Court.

The Appellate Division, by a judgment delivered by Harvey C.J. and concurred in by Walsh and Clarke JJ., declared that s. 9 of the Act did not apply to the second respondents, Mercury Oils, Ld., as that company had been incorporated under Dominion legislation. The Court was also of opinion that certain provisions of the Act were ultra vires as being in relation to the criminal law, but that they were severable from the sections in question in the proceedings. The judgment is reported at 25 Alb. L. R. 310.

1931. Dec. 15, 17, 18. *Tilley K.C.* and *Geoffrion K.C.* (with them *Frank Gahan*) for the appellants. The Act, as appears from its full title, was for the prevention of fraud in connection with sales of securities. The title may be looked at to ascertain the object of the legislature: *Fenton* v. *Thorley & Co.* (1) Similar statutes have been enacted recently by all but one of the Canadian Provinces. The Act was within the competence of the Provincial legislature under the British North America Act, 1867, s. 92, heads 13, 15, 16. Having regard to s. 3 (*b*) and (*d*), the Act did not make registration necessary in the case of a company issuing its own shares. But in any case the Act did not destroy or impair the status or capacities of Dominion companies so as to be invalid under *John Deere Plow Co.* v. *Wharton* (2) and *Great West Saddlery Co.* v. *The King*. (3). *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (4) is distinguishable, as in that case the Act wholly precluded a Dominion company from selling

(1) [1903] A. C. 443, 447.
(2) [1915] A. C. 330.
(3) [1921] 2 A. C. 91.
(4) [1929] A. C. 260.

its shares unless it was registered. A Provincial legislature can validly subject a Dominion company to restrictions in carrying on its business if the restrictions are otherwise competent and common to all companies: *Colonial Building and Investment Association* v. *Att.-Gen. of Quebec* (1); *Great West Saddlery Co.* v. *The King* (2); *In re Companies Act*, 1929. (3) If any of the provisions are ultra vires, the Act should be held invalid only to that extent: *Rex* v. *Nat Bell Liquors, Ld.* (4)

Pritt K.C. (with him *Helman K.C.*) for the respondents; *Varcoe K.C.* for the Attorney-General for Canada, intervener. Sect. 3 (*o*) of the Act excepts the issuance of its own shares by a private company from the registration requirements, it is clear therefore that they apply to a public company issuing its shares. The restrictions imposed upon companies in carrying out purposes for which they have been incorporated by the Dominion so affect their status and capacities that the provisions are invalid as to such companies: *John Deere Plow Co.* v. *Wharton* (5); *Great West Saddlery Co.* v. *The King* (6); *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (7) The inquiries authorized by s. 9 are of so wide a character that the validity of the Act as a whole is called in question. It is invalid, both upon the above ground and as encroaching upon the legislative power of the Dominion with regard to the criminal law under s. 91, head 27, of the Act of 1867; that head means the criminal law in its widest sense: *Att.-Gen. for Ontario* v. *Hamilton Street Ry. Co.* (8) Sect. 20 of the Act, among others, clearly so encroaches; s. 19 purports to give the Lieutenant-Governor power to create offences. The provisions of s. 9 are not within s. 92, head 13 (property and civil rights), of the Act of 1867, but within s. 91, head 2 (regulation of trade and commerce), and s. 91, head 27 (criminal law): *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada.* (9) Under the Dominion Companies Act there were already provisions for official inquiries into the affairs of companies incorporated by the Dominion. The invalid provisions of the Act are so interwoven with it that they cannot be treated as severable: *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (1) Further, the inquiries proposed by s. 9 were of a judicial character, and the appointment of the Attorney-General to conduct them was therefore invalid under s. 96 of the Act of 1867.

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(1) (1883) 9 App. Cas. 157, 166.
(2) [1921] 2 A. C. 91, 119, 120.
(3) (1931) 25 Alb. L. R. 206.
(4) [1922] 2 A. C. 128, 137.
(5) [1915] A. C. 330.
(6) [1921] 2 A. C. 91.
(7) [1929] A. C. 260.
(8) [1903] A. C. 524.
(9) [1931] A. C. 310.

Tilley K.C. replied.

1932. Feb. 4. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of Alberta in proceedings taken by the plaintiffs to challenge powers sought to be exercised by the Attorney-General of Alberta under the provisions of the Security Frauds Prevention Act, 1930 (Alberta), Statutes of Alberta 20 Geo. 5, c. 8. Under the terms of s. 9 of that Act the Attorney-General or any delegate appointed by him has power to examine any person or company at any time in order to ascertain whether any fraudulent act as defined by the statute or any offence against the Act or the regulations has been, is being, or is about to be, committed. The Attorney-General, Mr. Lymburn, had appointed the defendant, Mr. Frawley, to hold the examination in question, and Mr. Frawley had summoned the plaintiff, Mr. Mayland, to attend him for examination on an inquiry amongst other things into items appearing in the balance-sheet of the other plaintiff, Mercury Oils, Ld., as at December 31, 1930. Mr. Frawley also gave notice that he intended to inquire into a transaction between Solloway Mills & Co., Ld., and the plaintiff Mayland respecting the exchange of certain shares, and the assumption by Mayland of an underwriting agreement entered into between Solloway Mills & Co., Ld., and Mill City Petroleums, Ld. All the companies mentioned are incorporated under the provisions of the Dominion Companies Act.

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(1) [1925] A. C. 561.

The plaintiffs, by their statement of claim, claimed a declaration that the statute or, alternatively, s. 9, was ultra vires the Province, and an injunction restraining the Attorney-General and Mr. Frawley from proceeding with the examination. They gave notice of motion for an interim injunction, which came before Ives J., and with the consent of the defendants was referred by him to the Appellate Division of the Supreme Court. On April 23, 1931, the Appellate Division made an order declaring that s. 9 of the Act had no application to the plaintiff or the three companies mentioned above, and that the defendants had no authority to proceed with the examinations and investigations referred to in the statement of claim. The reasons for the judgment were delivered by Harvey C.J., concurred in by Walsh and Clarke JJ. The learned Chief Justice reviewed the statute as a whole, but founded his decision on the ground that the Provincial legislature could not delegate to the Attorney-General power to obtain information unlimited in extent, inasmuch as that legislature itself was restricted in its power to obtain from a Dominion company unlimited information, apparently because such a requirement would clash with the Dominion legislature as to companies. It was therefore held that s. 9 was not applicable to Dominion companies; not as would appear as a matter of construction but because it was ultra vires in relation to such companies, though it would severably be valid as to other companies.

Before the Board the attack was made on a broader ground. The whole Act was invalid so far as it related to Dominion companies, because it destroyed their status by making it impossible for them to issue their share capital. In this respect it was said the case was covered by the decision of this Board in *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (1) It was further contended that apart altogether from Dominion companies the Act was invalid because under the colour of dealing with the prevention of fraud in share transactions it was assuming to legislate as to criminal law, a class of subject reserved to the Dominion. Apart from invalidity, it was further said that if the terms of the Act were examined the three Dominion companies in question, as well as the plaintiff Mayland, did not carry on any business as brokers in shares; and it was only to transactions by brokers that the provisions of s. 9 applied. Their Lordships cannot accept any of these contentions.

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(1) [1929] A. C. 260.

When the framework of the Act is examined it will be found that after an elaborate definition clause it is divided into five parts. The material definitions are those of broker, which includes every person, other than a "salesman" as defined, who is engaged in the business of "trading" in securities, and "trading" includes the solicitation or obtaining a subscription to any security. "Salesman" includes every person employed by a company to trade in securities. Part I. is entitled "Registration of brokers and salesmen," and provides in substance that no person may trade in securities unless he is registered as a broker or salesman. The prohibition is confined to "persons" which by the definition clause does not include corporations. A corporation may however be registered, in which event its officials do not need separate registration. Registration is made subject to the approval of the Attorney-General, who may direct that registration be refused for any reason which he may deem sufficient. Registered persons must enter into a personal bond, and may be required to enter into a surety bond each in the sum of $500, conditioned for payment if the registered person, amongst other events, is (in the former bond) "charged with," (in the later bond) "convicted of," a criminal offence, or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise intra vires, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded. Incidentally the net has been drawn so wide as to cover the issue of shares by a public company, with the result that a company cannot issue its shares to the public unless for that purpose it employs a registered broker or salesman, or unless the company itself is registered. It is said that these provisions so far as they affect Dominion companies are ultra vires according to the principles adopted by this Board in *John Deere Plow Co.*, v. *Wharton* (1); *Great West Saddlery Co.* v. *The King* (2); and *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (3) In those cases there was a general prohibition to companies either to trade at all or to issue their capital unless the company was registered. The legislation was held ultra vires because the legislative powers of the Province are restricted so that "the status and powers of a Dominion Company as such cannot be destroyed" (*John Deere Plow Co.* case (1)) and legislation will be invalid if a Dominion company is "sterilized in all its functions and activities" or "its status and essential capacities are impaired in a substantial degree" (*Great West Saddlery Co.* case (2)). It appears to their Lordships impossible to bring this legislation within such a principle. A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the Province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities. As to the issue of capital there is no complete

(1) [1915] A. C. 330.
(2) [1921] 2 A. C. 91.
(3) [1929] A. C. 260.

prohibition, as in the *Manitoba* case (1) in 1929; and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilized or its status and essential capacities impaired in a substantial degree.

Their Lordships have discussed this part of the Act because the attack of the respondents was mainly directed to it, partly because it was said that the pith and substance of the Act was contained in it and that by sterilizing Dominion companies it was inseverably invalid; and partly because it was said that, even if severable so far as registration of Dominion companies was concerned, inasmuch as inquiry could be made under Part II. as to an offence against the Act, an inquiry under Part II. might be directed to an alleged offence invalidly created, and therefore the inquiry provisions of Part II. themselves were invalid. This brings their Lordships to the consideration of Part II., and it will be found that once the main attack on registration has failed there is little to be said against this part of the Act.

Sect. 9, under which the examination in dispute in these proceedings was ordered, empowers the Attorney-General or any delegate appointed by him to examine any person or company in order to ascertain whether any fraudulent act or any offence against the Act or regulations has been, is being, or is about to be committed. The definition of "fraudulent act" appears to be very wide, in some cases having no relation to securities or dealing in securities; and it is possible that if the question becomes relevant a limited construction would be put upon the very general terms used. But this has no bearing upon the question of validity. The examination is not confined to questions of registration, nor are the persons or companies to be examined limited to persons or companies who themselves trade in securities. It seems obvious that the object of the section would be defeated unless the powers of examination extended to persons who might have relevant knowledge, including companies and the officials of companies whose securities might be or be about to be the subject of dealings with the public. The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. There appears to be no reason for excluding Dominion companies from the inquiries of the Attorney-General under this section; and no inconsistency between this legislation and the powers of inquiry under the Dominion Companies Act made on application of members of a company and for a limited purpose—namely, the investigation of the affairs of the company. Their Lordships are unable to agree with the view which was adopted by the Appellate Division that in respect of the subject-matter under discussion the legislature of the Province has only a limited right to require information.

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(1) [1929] A. C. 260.

Part III. of the Act provides for the appointment of auditors to audit the accounts of brokers and to advise the executive committees of stock exchanges in the Province. There appears to be no ground for disputing the validity of these provisions.

Part IV. by s. 14 contains a provision making it an offence for a broker in certain transactions for customers to place beyond his control securities he may be carrying for customers, and ss. 15 and 16 provide for the necessary records of such transactions. The penal provisions of s. 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 & 21 Geo. 5, c. 11 (Canada), s. 5, which now presumably occupies the field so far as the criminal law is concerned. The substantive provisions of the section avoiding the impugned transaction at the option of the customer and the provisions of the other sections of this part cannot be attacked. Part V. has general provisions which need not be noticed except as to the argument of the respondents founded on the words of s. 20, which provide (inter alia) that any person who does any fraudulent act not punishable under the provisions of the Criminal Code of Canada shall be liable to fine and imprisonment. It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable. In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion companies. The provisions therefore of Part II. of the Act appear to be competent Provincial enactments dealing with property and civil rights and have to be obeyed by persons subject to them.

In the result the order of the Appellate Division should be set aside and the motion should be dismissed. The respondents must pay the costs here and below.

In the Court below the appellants agreed that if the Court decided in favour of the plaintiffs the motion should be treated as the hearing of the action and that final judgment should be given accordingly. There appears to be no such agreement by the respondents in the event that has happened. Presumably they will so agree, but in the meantime their Lordships can only say that the judgment for the plaintiffs should be set aside with the consequences already stated, and the action continue in the Supreme Court, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada, intervener: *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* STAG LINE, LIMITED . . . . . APPELLANTS;

1931

Dec. 10.

AND

FOSCOLO, MANGO AND COMPANY, LIMITED, AND OTHERS . . . . RESPONDENTS.

Shipping—Charterparty—Bill of Lading—Liberty to call at Ports in any order for "bunkering or other purposes"—Deviation to land Engineers supervising Superheating Apparatus—"Reasonable deviation"—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sch.*, *Art. IV.*, *r.* 4.

A cargo of coal was loaded on the appellants' steamship *Ixia* at Swansea for carriage to Constantinople under bills of lading which gave the shipowners "liberty . . . . to call at any ports in any order, for bunkering or other purposes, ... all as part of the contract voyage."

The *Ixia* was fitted in the interest of the shipowners with a superheater, and when she started from Swansea she had on board two engineers for the purpose of observing whether the superheater was working efficiently. It was intended to land these two engineers with the pilot at Lundy, but when the vessel reached that island, no satisfactory trial of the superheater having been obtained, the two engineers remained on board and were later landed in St. Ives Bay. In proceeding there and for some time after leaving there the *Ixia* was off the usual route. Shortly after resuming her voyage from St. Ives Bay, and before she had returned to the usual route, the *Ixia* stranded on the Cornish coast, and both ship and cargo were lost. In an action for damages by the cargo owners, MacKinnon J. and the Court of Appeal having found that the deviation was not reasonable in the circumstances:—

Held, (1.) that the departure of the *Ixia* from the contract route did not come within the liberty given by the bills of lading, as the words "other purposes" in the context must be construed as meaning the calling at a port for some purpose having relation to the contract voyage; (2.) on the question whether the deviation was reasonable within Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, 1924, that the findings of the Courts below ought not to be disturbed; (3.) that, assuming that the deviation was not reasonable, the immunity of the carrier under Art. IV., r. 2 (*c*), from loss or damage arising from perils of the sea did not apply.

Observations on the meaning of "reasonable deviation" in Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, 1924.

Decision of the Court of Appeal [1931] 2 K. B. 48 affirmed.

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of MacKinnon J. in favour of the respondents (plaintiffs in the action) for 8000*l.*

The facts are stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Lord Buckmaster.

1931. Oct. 30; Nov. 2. *Dunlop K.C.* (with him *Sir Robert Aske*) for the appellants. 1. As to the liberty clause in the charterparty, which is incorporated in the bills of lading, it is conceded that some limitation must be put upon the words "other purposes" by reason of the word "bunkering," and that those words do not include a purpose which would be inconsistent with the main object of the contract (*Glynn* v. *Margetson & Co.* (2); *Attorney-General* v. *Benjamin Smith & Co.* (3)), but they are not limited to purposes similar to bunkering or to purposes for the benefit of both parties, and, whatever limitation is put upon this clause, it would not exclude the calling at St. Ives for the purpose of landing the two engineers who had been taken on board to see that the superheater was working properly. "Other purposes" in this context means other business purposes, and any act within the prescribed liberty is not a deviation.

2. As to the meaning of the words "any reasonable deviation" in para. 4 of Art. IV. of the Schedule to the Carriage of Goods by Sea Act, 1924, Scrutton L.J. was not right in saying that para. 4 was not intended to extend the permissible limits of deviation as stated in *The Teutonia* (4), but the view of Greer L.J. is to be preferred where he says the paragraph is to be read as enlarging the area in which a deviation would not be deemed to be a breach of contract, and that the words "reasonable deviation" ought not to be confined to what is reasonably necessary or required in the interest of both parties, but includes any deviation which is reasonable in the circumstances. What is reasonable in any given case is a pure question of fact. All the circumstances must

(1) [1931] 2 K. B. 48.
(2) [1893] A. C. 351, 355.
(3) (1918) 87 L. J. (K. B.) 1045, 1052.
(4) (1872) L. R. 4 P. C. 171, 179.

be taken into account, and the person to decide whether to depart from the usual route or to keep his course is the master: per Willes J., delivering the judgment of the Exchequer Chamber in *Notara* v. *Henderson* (1), cited with approval by Gorell Barnes J. in *The Savona* (2); *Phelps, James & Co.* v. *Hill.* (3) Upon the evidence this was a reasonable deviation within the meaning of the Act.

3. Even if the deviation was not reasonable, the immunity given to the ship by Art. IV. of the Schedule to the Carriage of Goods by Sea Act, 1924, para. 2, from loss resulting from "perils of the sea" applies. No doubt at common law the carrier loses the benefit of the exceptions in the contract of affreightment if he does not carry the goods by the direct course, but this does not affect the statutory immunity, inasmuch as by Art. III., para. 2, the duty of the carrier properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods carried is expressly stated to be "subject to the provisions of Art. IV."

A. T. Miller K.C. and *Le Quesne K.C.* (with them *R. F. Hayward*) for the respondents. As to the fact of deviation there was no necessity for the operation in which the engineers were engaged; all the time until the ship struck the rocks she was out of her course and was deviating; all the judges agree that this deviation in the circumstances was not reasonable. The decision of what is reasonable in the circumstances is a question of fact, and on that the respondents have the concurrent findings of the Courts below. In order to determine what is a reasonable deviation, the interests of both parties, the shipowner and the cargo owner, are to be considered. There may be a reasonable deviation in the interests of one party only in the case of apprehended danger, but it is submitted in that case only; and it almost always happens that the danger to the ship would be a danger to the cargo also. The Act of 1924 does not alter the general law as to reasonableness; it does not mean as a general rule that the interests of both parties are not to be considered, and it does not cover a case where the necessity has been brought about by the fault of the shipowner. It definitely alters the law in one respect—namely, as regards a deviation to save property—but not otherwise. It is presumed that "the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute": Maxwell on the Interpretation of Statutes, 7th ed., p. 71. In *Phelps, James & Co.* v. *Hill* (1) Lopes L.J. says, on the question of deviation, that "the shipowner's contract is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly without any unnecessary deviation. But this undertaking is to be understood with reference to the circumstances that arise during the performance of the contract. He is not answerable for delays or deviations which are occasioned or become necessary without default on his part." Here the deviation never became necessary at all, and it became desirable owing to the shipowner's own conduct. As to the liberty clause it must be for the furtherance of the joint adventure: *James Morrison & Co., Ld.* v. *Shaw, Savill, and Albion Co., Ld.* (2) "These clauses are to be construed strictly so as not to extend their force beyond the plain meaning of the words in relation to the subject-matter and the intention of the parties, as collected from the whole of the document": Arnould on Marine Insurance, 10th ed., § 422, p. 580. The onus was upon the appellants to show that the deviation was reasonable, and that onus they have failed to discharge.

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(1) (1872) L. R. 7 Q. B. 225, 237.

(2) [1900] P. 252, 260.

(3) [1891] 1 Q. B. 605.

Dunlop K.C. replied.

The House took time for consideration.

1931. Dec. 10. LORD BUCKMASTER. My Lords, the appellants are the owners of the steamship *Ixia*, of 4300 tons dead weight exclusive of bunkers, which they chartered to the respondents, Foscolo, Mango & Co., Ld., under a charter-party dated June 14, 1929, made between the appellants and the second respondents, who acted as agents for the charterers. The vessel was chartered to carry a cargo of coal sold by the second respondents to the first not exceeding 4350 tons nor less than 4100 tons, and to proceed from Swansea, where the coal was to be loaded with all possible despatch, to Constantinople. The terms of the charter-party were incorporated in the bills of lading. The charter-party contained a clause (clause 6) giving the vessel liberty "to call at any ports in any order for bunkering or other purposes or to make trial trips after notice." The usual and customary route for the voyage was from Swansea, south of Lundy, from thence in a straight line to a point about five miles off Pendeen, on the north coast of Cornwall, and then with a slight alteration to the east to Finisterre and so on.

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(1) [1891] 1 Q. B. 605, 613.

(2) [1916] 2 K. B. 783, 800.

The ship had been fitted with a heating apparatus designed to make use of the heat which might otherwise be wasted as steam and so to diminish the bill for fuel. This apparatus had not been working satisfactorily, and the owners therefore arranged to send representatives of the engineers to make a test when the vessel started on her next voyage. Two engineers accordingly joined the boat, the intention being that they should leave the ship with the pilot somewhere off Lundy.

The firemen on board the ship were not in possession of their full energies when the boat started at 1.45 in the morning on June 31, 1929, owing to excessive drinking before they joined the ship. The result was that a proper head of steam necessary for making the test was not got up in time to enable the test to be made before the pilot was discharged. Accordingly they proceeded on the voyage until the ship was off St. Ives, when the ship was turned about five miles out of its course to enter the St. Ives Harbour in order that the engineers might be landed. After landing them, the ship did not go straight back to the recognized route that she ought to have pursued, but hugged too closely the dangerous coast of Cornwall, and ran on a rock called the Vyneck rock, with the result that the vessel and cargo were totally lost though, fortunately, there was no loss of life. The accident took place at about 3.20 P.M., there was a moderate wind from E.N.E., the weather was cloudy, but visibility was moderately good up to six miles.

The respondents sought to recover damages for loss of their cargo upon the ground that there had been an unlawful deviation from the contracted course. The appellants made three answers to this claim: first, they set up the clause of the charterparty to which reference has been made; and, secondly, they said by the Carriage of Goods by Sea Act, 1924, the rules in the Schedule must be regarded as incorporated in the contract and, by those rules, they were entitled to make the deviation which led to the disaster.

As is well known, the statute provides that the rules are to have effect in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland. The rules that are relevant are to be found in Art. IV. of the Schedule, sub-head 2, of which sub-ss. (*a*) and (*c*) are in the following terms:—

> " 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from :—
>
> (*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
>
> (*c*) Perils, dangers and accidents of the sea or other navigable waters."

Sub-head 4 of the same article is in these terms:—

> " 4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

The appellants' argument upon the statute is, firstly, that the accident was a peril of the sea; and, secondly, that the deviation in question was a reasonable deviation and consequently was not an infringement of the contract of carriage.

It is well to consider these arguments in the order in which I have stated them. With regard to the clause of the charterparty, the contention is that to land the two engineers at St. Ives was an " other purpose " within the meaning of clause 6 and consequently permitted by the charterparty itself. This argument depends upon the view that it is impossible to get a specified category in which the words " other purposes " may be confined when the illustrative word at the beginning of the sentence consists only of one description. I find it difficult, and I think it is undesirable, to attempt to specify in exact language what are the limitations imposed by the use of such a word prefacing others of general import. To my mind it is impossible to frame a rule applicable to all the various documents in which such phrases are to be found. General words in a will following a specific instance may require different interpretation from that demanded by similar words in an Act of Parliament or a charterparty. To attempt in these circumstances to say that two or more words are essential before you can define a class does not assist in the present case. The word " bunkering " must have some demonstrative and limiting effect, and the phrase " or other purposes " following it cannot be so construed as to disregard the effect of the first example and assume that any purpose is thereby permitted. If that were so, the word " bunkering " might be left out. Nor am I prepared to define what are the limitations within which the phrase " other purposes " must be confined, but I can find nothing kindred to bunkering or associated with the operation that is involved in landing two men at a port that is not on any part of the specified route.

The passage from the judgment of Lord Herschell in *Glynn* v. *Margetson & Co.* (1) is in exact accordance with the view I have expressed. I agree with Scrutton L.J.'s judgment upon this point and I do not think that it demands further discussion.

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(1) [1893] A. C. 351, 355.

Turning from the words of the contract itself to the implied clauses introduced by the statute, the first point can, I think, be disregarded. It involves the view that perils and accidents of the sea are not qualified by the provisions as to deviation, and that such perils exempted the shipowner from responsibility for damage if they arise from or in the course of deviation, whether such deviation be reasonable or not. In my opinion clause 4 must be given its full effect without rendering it to a large extent unnecessary by such an interpretation, for it would follow from the arguments that a peril encountered by deviation, wholly unreasonable and wholly unauthorized, would be one for which the shipowner would be exempted from loss. In other words, the reasonable deviation would then only apply to questions of demurrage whatever the deviation might be.

The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. It hardly needed the great authority of Lord Herschell in *Hick* v. *Raymond* (1) to decide that in construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one. But if, when full consideration has been given to this fact, two Courts have decided that a set of circumstances are reasonable, unless it can be shown that the learned judges have misdirected themselves in reaching their conclusion, or have overlooked any important consideration or introduced considerations that did not deserve notice, it would not, I think, be in accordance either with good sense or the comity of the Courts to decide that what they thought was reasonable other people did not. In this case three judges have decided that the deviation here could not be so regarded—and Greer L.J. has agreed for a slightly different reason, because he thought

(1) [1893] A. C. 22.

the original deviation was permissible to St. Ives but not afterwards—but I think that all of them have really considered the facts that were necessary for the purpose, and I am not prepared to differ from the conclusions that they have reached. I do not think elaborate definitions, whether contained in dictionaries or judgments, are of much use in determining the value of a word in common use which means no more in this context than a deviation which where every circumstance has been duly weighed commends itself to the common sense and sound understanding of sensible men.

I notice that Scrutton L.J. also supports his judgment upon the view that the rules in the Schedule did no more than incorporate in a codified form the permissible limits of deviation which had previously been stated in *The Teutonia.* (1) Upon the view I take it is unnecessary to consider the soundness of this conclusion and I express no opinion upon it. Nor again is it necessary to determine whether Greer L.J. was right in assuming that the deviation became unreasonable after St. Ives, but I think there is much to be said in support of his reasoning. The deviation had not ended at the port. It continued until the contracted line of route was resumed, and to deviate by going along the coast, though it may be regarded as bad seamanship, might none the less be an unreasonable deviation.

For these reasons I think the appeal should be dismissed.

LORD WARRINGTON OF CLYFFE (read by LORD TOMLIN). My Lords, the respondents were the owners of a cargo of coal shipped on board the appellants' steamer *Ixia* for carriage from Swansea to Constantinople. The cargo was lost off the coast of Cornwall as the result of the stranding of the vessel—namely, a peril of the sea, incurred owing to negligence on the part of the persons in charge. The action was brought by the owners of the cargo for damages occasioned by the loss. The shipowners pleaded that under the contract of carriage perils of the sea and loss through negligence of their servants were excluded, and therefore they were not

(1) L. R. 4 P. C. 171, 179.

H. L. (E.)
1931

STAG LINE, LD. v. FOSCOLO, MANGO & Co.

Lord Warrington of Clyffe.

liable. The cargo owners replied that the shipowners had without justification departed from the contract route and were therefore disentitled to rely on the exceptions in question. MacKinnon J., before whom the action was tried, gave judgment for the respondents, and his judgment has been affirmed by the Court of Appeal (Scrutton, Greer and Slesser L.JJ.). Hence the present appeal.

The contract of carriage was contained in a bill of lading dated June 29, 1929, which incorporated the terms of a charterparty dated June 14, 1929, and which also contained a stipulation that all the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the Schedule thereto, were to apply to the contract contained in the bill of lading, and the owners and the charterers were to be entitled to the benefit of all privileges, rights and immunities contained in the said Act and the Schedule thereto as if the same were therein (namely, in the bill of lading) specifically set out.

There is no dispute that the contract route was from Swansea to Constantinople, nor that the accident happened at a time when the ship was not on that route, and the question is whether the deviation was justified by the contract. The deviation resulted from the decision of the master to call at St. Ives for the purpose of dropping there two engineers who had been taken on board at Swansea for the purpose of testing and adjusting certain steam and fuel-saving apparatus, a process which could only be effected under sea-going conditions and with a full head of steam. The shipowners attempted to justify the deviation in two ways: First, they said the contract allowed the ship to call at any ports in any order for bunkering or other purposes, and that under this they were entitled to call at St. Ives for the purpose above mentioned; and, secondly, they relied on Art. IV., r. 4, of the Schedule to the Act of 1924, which is in the following terms: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

MacKinnon J. and the members of the Court of Appeal have decided against the appellants on both points.

As to the first point, as a matter of construction the words "or other purposes" cannot in my opinion receive the same wide construction as they might have received had bunkering not been specifically mentioned. They must at all events be limited by reference to the nature and purpose of the contract voyage, and I agree with the learned judges in the Courts below that the purpose of landing the two engineers was not a purpose which could be brought within the liberty relied upon. I may add, however, that I do not base my conclusion upon the particular circumstances—namely, the drunkenness of the stokers and the consequent delay in raising a full head of steam, which induced the master to decide to land the two engineers at St. Ives rather than at Lundy as originally proposed; I think the calling at St. Ives would not have been justified whatever had been the cause of the delay in concluding the work of the engineers.

But there remains the further question whether the deviation to St. Ives and thence to the contract route was a reasonable deviation and therefore justified by the provisions above mentioned contained in the Schedule to the Act of 1924.

I confess I do not feel the difficulty experienced in the Courts below, and particularly by MacKinnon J., in giving a meaning to the word "reasonable."

It is quite usual for a tribunal—it may be a jury or it may be a judge sitting alone—to decide whether or not a course of action or a particular transaction is reasonable. This is a question of fact and has to be answered after giving due consideration to all the relevant circumstances and not on any dictionary meaning of the word. In the present case we find a contract under which the ship is prima facie bound to pursue a certain course. It did not in fact do so but pursued a course which brought it into a much closer proximity to the Cornish coast. This deviation was in the interest of the ship alone. In my opinion this fact did not by itself make it unreasonable, It may well be that the interests of the cargo owners were affected in so slight a degree that the master, acting as a reasonable man and responsible both to ship and cargo, was entitled to regard the proposed course as one he was free to take. If he had decided, after leaving St. Ives, to stand away from the coast and thus regain the contract course I should have felt some difficulty in saying that the deviation was not reasonable and should have preferred the view of Greer L.J., but, even so, it would not follow that we should be justified in saying that the conclusions of the other judges in the Courts below were wrong, and unless we could say so we ought not to reverse their decision, which, as I have said, is a finding of fact. But, in my judgment, all difficulty in the way of agreeing with their view is removed by one element in the course selected by the master—namely, his decision that after leaving St. Ives the course should be at 1½ to 2 miles from the coast. I think it is clear that this course placed the ship and cargo in a position of peril to which they would not have been exposed if after leaving St. Ives the master had at once made for the open sea on his way to rejoin the contract route, and I fail to see any good reason for his not doing so. Nor can I agree that his decision amounted to mere negligent navigation. I think the course pursued from St. Ives southwards was as much a part of the deviation as that from Lundy to St. Ives, and the deviation would only be justified if the whole of it could be said to be reasonable. On the whole, I come to the conclusion that on this point also the appeal fails, and that it should be dismissed with costs.

LORD ATKIN. My Lords, this case assumes importance because it involves a question of construction of the Carriage of Goods by Sea Act, 1924, and has evoked a construction of that Act from at least one judge of great authority on such matters which I venture to think is based on a wrong method of approach to that Act. The *Ixia*, a ship of 1828 tons net register, sailed from Swansea to Constantinople with a full and complete cargo of coal under a charterparty in the terms of the Chamber of Shipping Welsh Coal Charter, 1896, as amended on various dates, the last of which was December 21, 1924. A bill of lading was taken by the charterers making the cargo deliverable to named consignees, Messrs. Foscolo, Mango & Co., Ld., "with liberty to call at any ports in any order for bunkering or other purposes . . . . all as part of the contract voyage; all the terms conditions and exceptions contained in the charterparty are herewith incorporated." The liberties given in the bill of lading are the same liberties as those given in the charterparty, and it appears to me with respect that whether the plaintiff be the charterer or the consignee the document to be construed is the charterparty.

I do not propose to set out the facts, but to discuss the points of law raised. The position in law seems to be that the plaintiffs are prima facie entitled to say that the goods were not carried safely: the defendants are then prima facie entitled to rely on the exception of loss by perils of the sea: and the plaintiffs are prima facie entitled in reply to rely upon a deviation. For unless authorized by the charterparty or the Act the departure to St. Ives from the direct course to Constantinople was admittedly a deviation. I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies. It remains therefore for the shipowners to show that the suggested deviation was authorized by the contract including the terms incorporated by the Act. They first rely upon the express liberty given by the charterparty "to call at any ports in any order for bunkering or other purposes . . . . all as part of the contract voyage." What exactly the Chamber of Shipping and the Documentary Council of the Baltic and White Sea Conference (who we are told in the document adopted this form of charterparty) meant by these

H. L. (E.)
1931
STAG LINE, LD. v. FOSCOLO, MANGO & Co.
Lord Atkin.

words I wish they could be asked. We have to struggle to find a meaning. They cannot be unlimited in scope, or they would authorize the shipowner to direct the ship to any part of the globe for any purpose he thought fit. Even if limited to port or ports on the geographical course of the voyage, as I think on authority they clearly must be, the purpose of the call must receive some limitation. The liberty could not reasonably be intended to give the right to call at an intermediate port to land or take on board friends of the shipowner for the purposes of a pleasure trip. On the other hand I find it very difficult to adopt the view which has found favour with one of your Lordships that they involve some limitation which is kindred to or associated with bunkering. Even if the purpose be extended beyond taking in motor fuel or supplies necessary for the navigation of the ship to supplies for the maintenance or comfort of passengers I find it difficult to put such a restricted meaning on the words in view of the collocation "any ports in any order" which seems to point to some purposes other than the restricted ones suggested. Logically I find a difficulty in excluding a suggested purpose from a class until I have formed some more or less definite conception of the nature of the class. I think myself that the purposes intended are business purposes which would be contemplated by the parties as arising in carrying out the contemplated voyage of the ship. This might include in a contract other than a contract to carry a full and complete cargo a right to call at port or ports on the geographical course to load and discharge cargo for other shippers. It would probably include a right to call for orders. But I cannot think that it would include a right such as was sought to be exercised in the present case to land servants of the shipowners or others who were on board at the start to adjust machinery, and were landed for their own and their owners' convenience because they could not be transferred to any ingoing vessel. I think, therefore, the shipowner is not excused by this clause.

There remains the provision of Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, which with the other Rules in the Schedule is incorporated expressly in the bill of lading pursuant to s. 3 of the Act. "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well known words of Lord Herschell in the *Bank of England* v. *Vagliano Brothers*. (1) Dealing with the Bills of Exchange Act as a code he says: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . . The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was." He then proceeds to say that of course it would be legitimate to refer to the previous law where the provision of the code was of doubtful import, or where words had previously acquired a technical meaning or been used in a sense other than their ordinary one. But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only

(1) [1891] A. C. 107, 144.

applies to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Having regard to the method of construction suggested above, I cannot think that it is correct to conclude, as Scrutton L.J. does, that r. 4 was not intended to extend the permissible limits of deviation as stated in *The Teutonia.* (1) This would have the effect of confining reasonable deviation to deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo owner and ship, as MacKinnon J. appears to hold, or even to such a deviation as would be contemplated reasonably by both cargo owner and shipowner, as has been suggested by Wright J. in *Foreman and Ellams, Ld.* v. *Federal Steam Navigation Co.* (2), approved by Slesser L.J. in the present case. A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but

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(1) L. R. 4 P. C. 171, 179.

(2) [1928] 2 K. B. 424, 431.

H. L. (E.)
1931

STAG LINE, LD.
v.
FOSCOLO, MANGO & Co.

Lord Atkin.

without obligation to consider the interests of any one as conclusive. I think this view conforms to that of Greer L.J., the only criticism of whose test I would make is that it appears unnecessary to introduce the reasonable cargo owner into the discussion. The decision has to be that of the master or occasionally of the shipowner; and I conceive that a cargo owner might well be deemed not to be unreasonable if he attached much more weight to his own interests than a prudent master having regard to all the circumstances might think it wise to do.

Applying then this test, was this deviation reasonable? I do not discuss the facts except to say that I see no ground for suggesting that the deviation was due to some default of the shipowner in respect of the firemen. In the absence of evidence directed to that issue it does not seem right to impute blame to the owners in that respect. I desire to refrain from expressing an opinion whether the question of whether a deviation is reasonable is a question of law or fact. In the present case we are judges both of law and of fact; and if the question is of fact the concurrence of the learned judges below seems to me to lose some of its value when regard is had to the meaning they attributed to the issue they were determining. I think that Greer L.J. is plainly right in applying the test of reasonableness to the deviation as a whole. It could not, however, be laid down that as soon as the place was reached to which deviation was justified, there was an obligation to join the original course as directly as possible. A justified deviation to a port of refuge might involve thereafter a shorter and more direct route to the port of destination compared with a route which took the shortest cut to the original course. On the other hand, though the port of refuge was justifiably reached, the subsequent voyage might be so conducted as to amount to an unreasonable deviation. Taking all the facts into account I am pressed with the evidence which the learned judge accepted, that after St. Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by deviation to St. Ives, was vastly increased by the subsequent course. It seems to me not a mere error of navigation but a failure to pursue the true course from St. Ives to Constantinople which in itself made the deviation cease to be reasonable. For these reasons I agree that this appeal should be dismissed.

LORD RUSSELL OF KILLOWEN (read by LORD THANKERTON). My Lords, the provisions of the contract in the present case which are relevant to the decision of this appeal are three in number: (1.) There was an exception of perils of the seas; (2.) There was liberty "to call at any ports in any order for bunkering or other purposes . . . . as part of the contract voyage"; (3.) The appellants in all matters arising under the contract were to be entitled to the rights and immunities contained in Art. IV. of the Schedule to the Carriage of Goods by Sea Act, 1924. I need not repeat the other facts of the case; they have already been stated.

That there was a departure from the direct route between Swansea and Constantinople is conceded, but it was said that the exception of perils of the seas still operated in favour of the appellants, because the call at St. Ives fell within the liberty above mentioned, and was accordingly either part of the contract voyage or a permitted deviation therefrom.

While I appreciate the difficulty of applying what is called the ejusdem generis rule where only one *species* is available out of which to construct the *genus*, nevertheless it seems clear that some limitation must be placed upon the words "other purposes." If they are to be read as free from any limitation, then it was unnecessary to specify the bunkering purpose. Some restriction must, therefore, exist; and for myself I am in agreement with the view that the *Ixia's* call at St. Ives, not being a call for the purposes of the contract venture, was not a call for "other purposes" within the meaning of the liberty.

The appellants next prayed in aid the provisions of para. 4 of Art. IV. in the Schedule to the Act of 1924. The Schedule is a schedule of rules relating to bills of lading which (by s. 1

of the Act) are to have effect in relation to and in connection with the carriage of goods by sea in ships from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland. Para. 4 of Art. IV. provides that "any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

It was said that the call at St. Ives was a reasonable deviation within this rule, with the result that the exception of perils of the seas still operated in exoneration of the appellants.

Whether the deviation was or was not reasonable appears to me to be a question of fact to be determined in each case upon the facts of each case. The trial judge here came to the conclusion that the reasonableness of the deviation had not been established; in other words he held that upon the facts proved the deviation was not a reasonable deviation. With this view Scrutton L.J. agreed: and, as I read his judgment, Slesser L.J. also. Greer L.J. took a somewhat different view. He thought that the whole deviation was unreasonable, by reason of the course which was set after leaving St. Ives.

For myself I am not prepared to differ from the view upon this question of fact, which was adopted by the trial judge and concurred in by the majority of the Lords Justices—namely, that upon the facts of the present case the deviation here was not a reasonable deviation. It follows accordingly that the appellants get no protection from para. 4 of Art. IV.

The appellants advanced one further argument which in no way depended for its decision upon fact, and which if successful would have far-reaching consequences. They contended that the Act of 1924 freed them from responsibility for loss arising from perils of the sea, notwithstanding any deviation reasonable or unreasonable; in other words that the Act had effected an alteration in the law which had hitherto prevailed. It was said that the obligation not to

H. L. (E.)
1931
STAG LINE, LD.
v.
FOSCOLO, MANGO & CO.
Lord Russell of Killowen.

deviate only arose under para. 2 of Art. III. under which the carrier must "properly and carefully load handle stow carry keep care for and discharge the goods carried," and that inasmuch as that paragraph was expressed to be subject to the provisions of Art. IV., the obligations imposed by para. 2 of Art. III. (including the obligation not to deviate) were expressly made subject to the provisions of para. 2 of Art. IV., which provided that neither the carrier nor the ship should be responsible for loss or damage arising or resulting from (amongst other things) "perils, dangers and accidents of the sea or other navigable waters." That was, as I understood it, the line of reasoning.

In my opinion the argument is unsound. It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms.

For these reasons I agree that the appeal should be dismissed.

LORD MACMILLAN. My Lords, on June 30, 1929, the steamship *Ixia* ran on a rock off the coast of Cornwall and the ship and her cargo of coal were totally lost. The owners of the cargo now seek to recover from the shipowners a sum representing the damage which they have sustained by reason of the casualty. The shipowners reply that the cargo was lost by a peril of the sea, as it undoubtedly was, and that consequently they are relieved from liability by virtue of the exception of such perils contained in the charterparty and incorporated in the bills of lading and also under Art. IV., r. 2 (*c*), of the Schedule to the Carriage of Goods by Sea Act, 1924, which provides that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . . perils, dangers and accidents of the sea . . . ." The bills of lading, as required by s. 3 of the Act of 1924, contain an express statement that the shipowners are to be entitled to the privileges, rights and immunities contained in (inter alia) Art. IV. of the Schedule to the Act.

To this plea the cargo owners rejoin that the shipowners have forfeited the benefit of the immunity because of their having acted in breach of the contract of affreightment by deviating from the contractual course of the voyage.

This in turn is countered by the shipowners, who maintain (1.) that the immunity from liability conferred by Art. IV., r. 2 (*c*), of the Schedule to the Act of 1924 is absolute and is not affected by any breach of contract on their part; (2.) that they committed no breach of contract, because under the charterparty and bills of lading they had liberty "to call at any ports in any order for bunkering or other purposes" and their alleged deviation in calling at St. Ives was in the exercise of that liberty; (3.) that if there was a deviation it was a reasonable deviation within Art. IV., r. 4, of the Schedule to the Act of 1924, which provides that "any reasonable deviation shall not be deemed to be an infringement or breach . . . . of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." There was also a suggestion that the vessel was making a trial trip within the permission to make such trips contained in the contract documents, but this is so clearly untenable that I need do no more than mention and reject it.

Turning then to the three contentions of the shipowners which I have set out above, I have no hesitation in negativing the first, which is so extravagant that if it were upheld the shipowners would be exempt from liability for loss resulting from a peril of the sea even if that peril were encountered when the vessel was on a deviation from her contract voyage which was not reasonable under r. 4 of the same Article.

As to the second contention, the liberty to call at any ports "for bunkering or other purposes" cannot be read as meaning that the ship was to be at liberty to call at any ports for bunkering purposes or any purposes other than bunkering, for that would be tantamount to saying that she might call at any port for any purpose. I read the words as meaning "for the purpose of bunkering or for any similar purpose." What purposes are similar to the purpose of bunkering I shall not attempt to define. It suffices to say that in my opinion the purpose for which the *Ixia* called at St. Ives was not a purpose in any way resembling so ordinary a maritime incident as bunkering.

There remains the shipowners' third contention, which is the real crux of the case. Was the deviation to St. Ives a "reasonable" one? The statute does not supply any criterion of reasonableness, and I doubt if it would have been possible to formulate a criterion of universal applicability, for the contingencies and emergencies which arise in maritime transport are as infinite in their variety as the vagaries of the sea itself. An undefined standard of reasonableness may sometimes be difficult to apply, but the task is one which judges and juries have had daily to perform from time immemorial. To give a single instance, the Sale of Goods Act, 1893, uses the expression "reasonable time" in six of its sections without any definition, though it prescribes in s. 56 that the question of what is a reasonable time is to be treated as a question of fact, and I am not aware that any serious difficulty has in consequence arisen in the administration of the statute. This at least has been laid down for our guidance, that the reasonableness of an act must be judged in relation to the circumstances existing at the time of its commission and not by any abstract standard. The act, too, must be considered as a whole, in the light of all the attendant circumstances. A conclusion so reached that a particular act was reasonable or unreasonable is in general a conclusion of fact; it is an inference of fact from a given set of facts.

Now in the present case there are concurrent judgments of the judge of first instance and the Court of Appeal finding unanimously that the deviation in question was not reasonable. Even if I were disposed to think otherwise—I do not for a moment say that I am—I should be slow indeed to disturb such a finding unless I were satisfied that those who had reached it had in so doing infringed some principle of law.

H. L. (E.)
1931
STAG LINE, LD.
v.
FOSCOLO, MANGO & CO.

Lord Macmillan.

It is no doubt obvious that the learned judges have considered the episode from varying points of view and have, as was natural, each been influenced by the aspect of it which appeared to him most conspicuous. But it cannot be inferred from this difference of emphasis that they have disregarded any circumstance which they ought to have considered or have taken into account any circumstance which they ought not to have considered. Thus I do not think that MacKinnon J. in giving weight to the circumstance that in his view the deviation was not in the joint interest of cargo and ship intended to lay down or to apply any absolute rule that no deviation could be reasonable which was not in the joint interest of cargo and ship. The absence of the element of joint interest may well be an important indication of unreasonableness without being conclusive. Nor do I think that Scrutton L.J. intended to lay down or apply any absolute rule that only a deviation to avoid imminent peril could be regarded as reasonable.

It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

As I have heard nothing to satisfy me that the judges below have reached their conclusion on wrong principles I concur in the motion that the appeal be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 10, 1931.

Solicitors for the appellants: *Holman, Fenwick & Willan.*

Solicitors for the respondents: *Charles Lightbound, Jones & Lightbound, for Ingledew & Co., Newcastle-upon-Tyne.*

[HOUSE OF LORDS.]

CONSOLIDATED LONDON PROPERTIES, LIMITED . . . . APPELLANTS;

H. L. (E.)*
1932
Jan. 29.

AND

JOHNSTONE . . . . RESPONDENT.

Revenue—Income Tax—County of London—Blocks of Flats—Unit of Assessment—" House or Building let in different . . . . Tenements "—Assessment on Landlord—Allowances for Repairs—Valuation (Metropolis) Act, 1869 (32 *& 33 Vict. c.* 67), *s.* 45—*Income Tax Act,* 1918 (8 *& 9 Geo.* 5, *c.* 40), *Schedule A, No. V., r.* 7; *No. VII., r.* 8 (*c*).

The owners of a building comprising eight residential flats and rooms for a porter appealed against eight assessments made under Schedule A of the Income Tax Act, 1918, in respect of the flats, on the ground that they were entitled to allowances under Schedule A, No. V., r. 7 (1.) (*b*), as amended by the Finance Act, 1923, s. 28. The property was within the area to which the Valuation (Metropolis) Act, 1869, applied, and in the valuation list in force during the tax year in question the gross value of each flat was shown separately, and the assessments complained of were in amounts corresponding to such gross values. All the flats were self-contained and had separate front doors abutting on to a common staircase inside the building, and there was one entrance to the street giving access to the whole building. Each flat was let to a separate tenant at a rent which included the rates and the cost of lighting and cleaning the common staircase and entrance and of providing a porter, with the result that the rents paid by the tenants largely exceeded the gross values contained in the valuation list. During the year of assessment the amount of the total rents payable under the leases was admitted, but the owners refused to give the particulars necessary to arrive at any outgoings, which should by law be deducted in making the assessment. The owners contended (1.) that the gross assessments in the valuation list were conclusive for the purpose of income tax under the Valuation (Metropolis) Act, 1869, during the quinquennial period in question and that the actual outgoings during any specific year forming part of that period were irrelevant; (2.) that under r. 7 of Schedule A, No. V., of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, they were entitled to the appropriate allowances from the gross Schedule A assessments set out in para. 3 of that rule for the purpose of collection. The Crown contended (1.) that under Schedule A, No. VII., r. 8 (*c*), the whole house was the unit of assessment and assessable in one sum—namely, the total amount of the gross values of the eight flats and the porter's rooms; (2.) that, on the figures before the Commissioners, the claim to reduction failed, since under Schedule A, No. V., r. 7 (2.), as amended by the Finance Act, 1923, s. 28, there was no title to the reduction claimed where the amount of the assessment was less than the rent by a sum greater than the authorized reduction which would be allowable if the assessment were on the amount of the rent after deducting from such rent any outgoing which should by law be deducted in making the assessment. The Commissioners were of opinion that the income tax assessments should follow the assessments as fixed under the Valuation (Metropolis) Act, 1869, and therefrom the appropriate deductions allowed for repairs in the case of each flat, and they reduced the assessments in accordance with para. 3 of r. 7.

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* *Present:* LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

Rowlatt J. and the Court of Appeal held that the whole house was the proper unit of assessment:—

Held, (1.) that it was incompetent to the Crown to raise their first contention, as the Income Tax Act, 1918, gave the Crown no right of appeal against an assessment; (2.) that if the taxpayer was to make good his claim to reduction, inquiry must be made as to outgoings, and that the case should be remitted to the Commissioners to determine what reduction, if any, should be allowed on the basis that the outgoings referred to in para. 2 of r. 7 were to be ascertained separately as to each flat and as to each year of assessment.

Decision of the Court of Appeal [1931] 1 K. B. 263 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. whereby an appeal by the Crown upon a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Kensington was allowed, and the decision of the Commissioners was reversed.

The appellants, the Consolidated London Properties, Ld. (hereinafter called "the company"), appealed against eight assessments made under Schedule A of the Income Tax Act, 1918, in respect of eight flats known as 1 Linden Gardens, Notting Hill Gate, W., in respect of the year ending April 5, 1927, on the ground that they were entitled to allowances under Schedule A, No. V., r. 7 (1.) (*b*), as amended by the Finance Act, 1923, s. 28.

1. No. 1 Linden Gardens was a building which contained eight flats used for residential purposes and rooms resided in by a porter. All the flats were self-contained, and each flat was let to a separate tenant. These flats had separate front doors abutting on to a staircase inside the building, which was common to all the flats. None of the flats

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(1) [1931] 1 K. B. 263.

H. L. (E.)
1932
CONSOLIDATED LONDON PROPERTIES, LD. v. JOHNSTONE.

communicated with any other. There was one entrance from the public street giving access to the whole building. A porter (who superintended the whole building) in the employ of the company resided in rooms in the basement. The appeals were against the respective assessments in respect of the eight flats let to tenants. The corresponding allowance claimed by the company in respect of the eight flats had in fact been made in respect of the porter's rooms, to which Schedule A, No. V., r. 7 (2.), as amended by the Finance Act, 1923, s. 28, sub-s. 3, did not apply, no rent being payable therefor, the company being the occupier.

2. The property was within the area to which the Valuation (Metropolis) Act, 1869, applied, and in the valuation list in force during the year ending April 5, 1927, the gross value of each flat was shown separately, and the assessments now in question were in amounts which were the same as the respective gross values appearing in such valuation list.

3. Under its lease, each flat was let on the terms that the rates, the cost of lighting the common entrance and staircase of the building by electricity and gas, the cost of the maintenance of the lifts and other parts of the building and the provision of a porter, and the cost of cleaning the common entrance and stairways were borne by the company. In the case of two flats only did the tenants make a fixed contribution of 10*l.* per annum towards the lighting of the entrance and staircase, services of porter and use of the lift, etc. The company was liable for external repairs to the whole building. The tenants of six of the flats were responsible for internal repairs.

4. During the year of assessment the total rents payable under the leases of the flats amounted to 1471*l.*, and the additional payment by way of fixed contribution of 20*l.*, but details were at the appeal refused of particulars necessary to arrive at any outgoings which should be deducted in making the assessment.

[Para. 5 of the case showed the gross values of the eight flats and the porter's rooms appearing in the valuation list for the quinquennial period 1926 to 1930 and the amounts of the assessments made to income tax in the tax year in question, the aggregate amount being 800*l.*, and also the rents reserved under the leases, the aggregate amount being 1471*l.* as above stated.]

6. On behalf of the company it was contended that: (1.) the gross assessments of the eight flats as fixed by the valuation committee for the Royal Borough of Kensington, were conclusive of the rents at which the flats might reasonably be expected to let during the quinquennial period and were conclusive for the purpose of income tax under the Valuation (Metropolis) Act, 1869, during that quinquennial period and that the actual outgoings during the three years ending April 5, 1927, were irrelevant.

(2.) Under r. 7 of Schedule A, No. V., of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, the company were entitled to the appropriate allowances from the gross Schedule A assessment set out in para. 3 of that rule for the purpose of collection.

7. On behalf of the Crown it was contended: (1.) That for the purposes of income tax under the Income Tax Act, 1918, Schedule A, No. VII., r. 8 (*c*), the whole of No. 1 Linden Gardens was the unit of assessment and assessable as such in one sum, and that under s. 45 of the Valuation (Metropolis) Act, 1869, such sum was the total amount of the gross values of the various flats (including the porter's rooms) appearing in the valuation list made under the last mentioned Act for the time being in force, i.e., 800*l.*

(2.) In any event the figures before the Commissioners showed that there was no title to the reduction claimed, as by the Income Tax Act, 1918, Schedule A, No. V., r. 7 (2.), as amended by the Finance Act, 1923, s. 28, there was no title to the reduction of the assessment claimed where the amount of the assessment was less than the rent by a sum greater than the authorized deduction which would be allowable if the assessment were on the amount of the rent, after deducting from such rent any outgoing which should by law be deducted in making the assessment.

8. In reply to the first contention on behalf of the Crown the company contended that each flat was rightly assessed as a separate hereditament and, furthermore, that whether this were so or not the Valuation (Metropolis) Act, 1869, was conclusive as to the hereditaments in the present case.

9. The Commissioners were of opinion that the income tax assessments should follow the assessments as fixed under the Valuation (Metropolis) Act, 1869, and therefrom the appropriate deductions allowed for repairs, in the case of each flat.

They accordingly reduced the assessments by amounts arrived at in accordance with the scale in para. 3 of the said r. 7.

The present case came on for hearing before Rowlatt J. immediately after *Towle* v. *Improved Industrial Dwellings Co.* (1) In that case the respondent company, who owned several blocks of flats in London built for the housing of the working classes, complained that the flats, which had formerly been assessed for income tax separately, were now assessed under Schedule A, No. VII., r. 8 (*c*), in blocks.

The Commissioners held (1.) that r. 8 (*c*) did not apply to flat properties within the County of London, valued under the Valuation (Metropolis) Act, 1869, and (2.) that, if the rule applied, the various flats should be assessed in blocks.

The Crown appealed against the first decision and the owners against the second.

Rowlatt J., after hearing both cases, was of opinion (1.) that r. 8 (*c*) was not a rule relating to value as applied to London, and that the premises in both cases fell within the rule; (2.) that the annual value of the entire hereditament should be ascertained by taking the sum of the annual values of the separate flats as appearing in the valuation list; (3.) that para. 2 of r. 7 of No. V. of Schedule A applied to premises in London and that no reduction in respect of the premises could be allowed unless the rents were shown not to exceed the assessments by the prescribed amount.

In the result he allowed the appeal of the Crown and dismissed the appeal of the owners in *Towle* v. *Improved*

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(1) [1931] 1 K. B. 263.

Industrial Dwellings Co. (1), and in the present case remitted the case to the Commissioners for them to discharge the existing assessments and raise one assessment on the whole building. The appeals in both cases were heard together.

The Court of Appeal (Lord Hanworth M.R., Slesser and Romer L.JJ.) affirmed the decision of the learned judge, Romer L.J. differing only on the question whether the annual value of the whole block should be taken as the sum of the annual values appearing in the valuation list and being of opinion that it would be necessary to make a separate valuation of the block.

1931. Nov. 30; Dec. 1, 3, 4. *R. M. Montgomery K.C.* and *Latter K.C.* (with them *Ernest G. Palmer* and *Elliot Gorst*) for the appellants. These flats are included in the valuation list, which is conclusive for all purposes of the Income Tax Acts. Each of the self-contained flats was in fact and in law a separate house or building for all the purposes of the Income Tax Acts and should be assessed and charged separately, as the Commissioners have held. Rule 8 (*c*) of No. VII. of Schedule A is in any case excluded from applying to No. 1 Linden Gardens, for the reason that the premises are situate within the Administrative County of London, and r. 8 (*c*), if applied thereto, would affect the valuation thereof. Rule 7 (2.) of No. V. of Schedule A is for the same reason excluded from application. The flats being included in the valuation list should be assessed for income tax at their gross value as appearing in the said list and not otherwise. The claim of the respondent to call for annual returns of rent actually received and of actual outgoings incurred during a specific year forming part of a quinquennial period nullifies the principle of a quinquennial valuation. The Commissioners had no jurisdiction to deal with the contention of the Crown that the entire house should have been assessed in one sum, because that question was not before them. No right of appeal is given by the Income

(1) [1931] 1 K. B. 263.

H. L. (E.)
1932
CONSOLIDATED LONDON PROPERITES. LD.
v.
JOHNSTONE.

Tax Act, 1918, to the Crown against an assessment, but the assessment is binding on the Crown, subject to there being an additional assessment on new facts.

[They referred to *Reg.* v. *St. George's Union* (1); *Williams* v. *Sanders* (2); *Metropolitan Properties Co., Ld.* v. *Dunham* (3); *Norwich Union Life Insurance Society* v. *Embleton* (4); *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (5); *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ld.* (6)]

Sir William Jowitt A.-G. and *Reginald Hills* for the respondent. The block of flats comprising the premises in question ought to be assessed and charged to income tax as one entire house or tenement in accordance with r. 8 (*c*) of No. VII. of Schedule A, inasmuch as the premises constitute a house or building let in different apartments or tenements and occupied by two or more persons severally within the meaning of that rule. Rule 8 (*c*) applies to the premises notwithstanding that they are situate within the Administrative County of London, because it is not a rule relating to the ascertainment of the value of the premises so as to be restricted from operation in London by the first General Rule of Schedule A. As to the jurisdiction of the Court, no complaint was made in the Courts below, and it is at least open to question whether the House ought now to deal with the point. If the Commissioners see that the assessment is based on a wrong basis they can of their own initiative discharge it. On the facts found in the case and the excess there shown of the actual rents of the flats over the annual value assessed the limitation in para. 2 of r. 7 of No. V. of the Schedule applies, and no reduction of any of the assessments for the purpose of collection in accordance with para. 1 of the said rule is permissible. As the allowance provided for by para. 1 of r. 7 admittedly applies to London, so does the limitation of the allowance where the actual rent payable exceeds the annual value assessed by the prescribed proportions equally operate in London.

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(1) (1871) L. R. 7 Q. B. 90.

(2) [1927] 2 K. B. 498; 11 Tax Cas. 673.

(3) (1929) 14 Tax Cas. 740.

(4) (1927) 137 L. T. 415; 11 Tax Cas. 681.

(5) (1875–6) L. R. 10 Ex. 305, 316; 1 Ex. D. 469.

(6) [1914] A. C. 870.

[They referred to *Turner* v. *Carlton*. (1)]

Montgomery K.C. replied.

The House took time for consideration.

1932. Jan. 29. LORD ATKIN. My Lords, I have had the advantage of reading the judgment which is about to be delivered by my noble and learned friend Lord Warrington and I concur in it.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) dated December 1, 1930, dismissing an appeal by the appellants from an order of the King's Bench Division (Rowlatt J.) dated May 26, 1930, whereby an appeal by the respondent upon a case stated by General Commissioners was allowed and the decision of the Commissioners was reversed.

The appellants are the owners of a house, No. 1 Linden Gardens, Notting Hill Gate, within the area to which the Valuation (Metropolis) Act, 1869, applies. It contains eight flats used for residential purposes and some rooms in the basement used as a residence for the porter. Each flat is self-contained and is let to a separate tenant. The details of the arrangement of the building are stated in the case and are those commonly to be found in blocks of flats in London and need not to be here repeated. The rents payable by the several tenants cover the rates and the cost of lighting the common entrance and the staircases, maintaining the lift, providing a porter and cleaning the common entrance and stairways, all of which and the cost of external repairs are borne by the appellants. In two cases the tenants make a fixed contribution of 10*l*. a year towards the cost of lighting and of the provision of a porter, etc., and for the use of the lift. In six cases the tenants are liable for internal repairs.

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(1) [1909] 1 K. B. 932; 5 Tax Cas. 395, 401.

The Valuation (Metropolis) Act, 1869, provides for quinquennial valuations, which are to remain in force for five years. In this case the five years commenced on April 6, 1926, and expired on April 5, 1931. The year of assessment in question is that ending April 5, 1927, the first year of the period.

In the valuation list then in force the eight flats and the porter's rooms were each assessed separately and the assessment and charge were all made upon the appellants as landlords under r. 8 (*c*) of No. VII. relating to Schedule A, but there was no assessment of the entire house or building such as is directed in r. 8 (*c*).

The appeal to the Commissioners was confined to the eight separate assessments in respect of the eight flats, and the Commissioners expressly stated in the case that the appeal was on the ground that the appellants were entitled to allowances under Schedule A, No. V., r. 7 (1.) (*b*), of the Income Tax Act, 1918, as amended by the Finance Act, 1923, s. 28.

Much of the difficulty experienced in this House in dealing with the present appeal arose in my opinion from the fact that the limited nature of the appeal to the Commissioners and of the ground on which it was presented was lost sight of both in the King's Bench Division and in the Court of Appeal, and points were argued and decided which really did not in this case arise for decision.

At the hearing before the Commissioners the contentions on the part of the appellants were (in effect): (1.) That the assessments in question were, under the Act of 1869, conclusive of the gross values, and therefore of the annual values for the purposes of income tax, and that the actual outgoings during the three years ending April 5, 1927, were irrelevant; (2.) That under Schedule A, No. V., r. 7, of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, the appellants were entitled to the appropriate allowances from the assessments as set out in para. 3 of that rule for the purposes of collection.

It was contended on the part of the Crown (in effect) that under the Income Tax Act, 1918, Schedule A, No. VII.,

r. 8 (*c*), the whole house was the unit of assessment and assessable in one sum—namely, the total amount of the gross value of the eight flats and the porter's rooms: (1.) That in any event the figures before the Commissioners showed that there was no title to the reduction claimed, reliance being placed upon para. 2 of No. V. of r. 7 above mentioned.

The first of these contentions on the part of the Crown raised altogether new matter. The officers of the Crown had had ample opportunity of raising this point before the valuation list had come into force. Under the Act of 1869, s. 45, such a valuation list is to be deemed to have been duly made in accordance with that Act and is for the purpose, amongst others, of income tax under Schedule A, conclusive evidence of gross values and of the fact that all hereditaments required to be inserted therein have been so inserted. The valuation list in force at the time of the appeal in question contained no valuation of the entire house as one unit, and if such a contention could be raised at all before the General Commissioners, it could in my opinion only be raised by an independent appeal on the part of the Crown (if such an appeal were competent) seeking to have the list altered by substituting one assessment in respect of the entire house for the nine separate assessments appearing in the list.

But no provision is made for an appeal by the Crown, and for, I think, obvious reasons. The assessment before it comes before the Commissioners has been examined and passed by the surveyor, and it has become in effect an assessment adopted by him as correct from the point of view of the Crown (Income Tax Act, 1918, ss. 119 and 120). Hence provision is made (s. 136) for an appeal by the taxpayer only, and the position of the surveyor is defined by s. 137, sub-s. 2 (*a*), (*b*) and (*c*). He may be present at the hearing, he may produce evidence in support of the assessment, and give reasons in support thereof. It was, therefore, in my opinion incompetent for the Crown to raise the first of its two contentions mentioned above, and the Commissioners were right in refusing it.

Unfortunately, as I think, Rowlatt J. being of opinion that on the true construction and effect of r. 8 (*c*) of No. VII. of Schedule A the entire house was the proper unit, and not realizing that the only "matter" before the Commissioners and the Court was the appeal of the present appellants for an allowance (s. 149, sub-s. 2 (*a*)), by his order dated May 7, 1930, directed that the case be remitted to the Commissioners with a direction to discharge the existing separate assessments and raise one assessment on the whole building. This order was affirmed by the Court of Appeal. For the reason given above—namely, that the question was not effectually raised so as to give the Court jurisdiction to make such an order, I think the order made by Rowlatt J. and affirmed by the Court of Appeal, ought not to have been made and should now be discharged.

But the discharge of the order of Rowlatt J. and that of the Court of Appeal does not dispose of the present appeal. It remains to be considered whether the Commissioners properly dealt with the matter actually before them—namely, the appellants' claim to the statutory allowances.

The Commissioners state that they were of opinion that the income tax assessments should follow the assessments as fixed under the Act of 1869, and that therefrom the appropriate reductions should be allowed for repairs in the case of each flat. They accordingly reduced the assessments by amounts arrived at in accordance with the scale in para. 3 of r. 7. In other words, they held that para. 2 of r. 7 did not in this case exclude the operation of the scale in para. 3.

The material parts of r. 7 as amended by s. 28 of the Finance Act, 1923, are as follows: "(1.) Where tax is charged upon annual value estimated otherwise than by relation to profits the following provisions shall have effect—(*b*) In the case of an assessment upon any house or building (except a farmhouse or building included with lands in assessment) the amount of the assessment shall, for the purposes of collection, be reduced: (i) where the owner is occupier, or chargeable as landlord . . . . by a sum equal to the amount of the authorised reduction hereinafter mentioned . . . .

"(2.) Where the amount of the assessment in the case . . . . of any house or building (except a farmhouse or building included with lands in assessment) is less than the rent by a sum greater than the authorised reduction which would be allowable if the assessment were on the amount of the rent, after deducting from such rent any outgoing which should by law be deducted in making the assessment, this rule shall not apply."

In para. 3 are specified the authorized reductions for the purposes of the rule, which vary with the amount of the assessment.

The construction of para. 2 of r. 7 is by no means easy, but I think that the object of it from the point of view of the revenue was to compare the net income derived from the house (i.e., the actual rent less any outgoing which should by law be deducted in making the assessment) with the annual value forming the basis of the assessment, and if that net income exceeds the annual value by a sum greater than the authorized reduction which would be allowable had the assessment been on such net income then to regard the taxpayer as having thus received an equivalent of the authorized reduction and therefore not to be entitled to any further allowance.

If I am right in this, and I do not think there is any dispute on the point, then it follows that as the net income varies from year to year the necessary inquiries as to the outgoings to be allowed in ascertaining the amount of the net income must be made in each year of assessment, and in this case, having regard to the form of the valuation list, must be made as to each flat separately.

The Commissioners have simply allowed from the assessed annual values the appropriate reductions in accordance with the scale in para. 3 of r. 7, thereby adopting the arguments on the part of the appellants mentioned above. This seems to me to be wrong. I cannot understand how the amount of the actual outgoings can be irrelevant to a claim for reduction under r. 7. In the present case the rents reserved by the leases so largely exceed the annual values under

Schedule A that if they are to be treated as representing the "net income" for the purposes of para. 2 that paragraph would clearly be operative. It seems to me to follow that if the taxpayer is to make good his claim to reduction inquiry must be made as to outgoings, and the Commissioners should not have allowed the authorized reduction until such inquiry had been made. The Commissioners have ample means of obtaining information if it is not tendered voluntarily by the taxpayer. I should have thought it was in his own interest to do so.

The result is that while the order of the Court of Appeal should be reversed, and that of Rowlatt J. discharged, the case should be remitted to the Commissioners to determine what deduction, if any, should be allowed in respect of each assessment on the basis that the amount of the outgoings referred to in para. 2 is to be ascertained separately as to each flat and as to each year of assessment.

I think the expense of both appeals below and of that to this House have been substantially occasioned by the position taken up by the respondent, and that the Crown ought to pay the costs here and below.

A great part of the argument in this House was devoted to the question of the construction and effect of r. 8 of No. VII. of Schedule A, and in particular of its application to the area of the Metropolis in view of the Act of 1869. As I have already said, this question does not arise in the present case, and for that reason I think it is undesirable that this House should express any opinion on that question, and I am fortified in this view by the fact that in the case of *Towle* v. *Improved Industrial Dwellings Co.* (1), which was heard by Rowlatt J. and the Court of Appeal at the same time as the present case, that question did arise, and was decided against the respondents. That case or some other like it may come before the House, and it is undesirable that the arguments therein should be prejudiced by any expression of opinion, which would be merely obiter.

LORD MACMILLAN. My Lords, I agree.

(1) [1931] 1 K. B. 263.

H. L. (E.)
1932
CONSOLIDATED LONDON PROPERTIES, LD.
v.
JOHNSTONE.

LORD ATKIN. My Lords, I am asked to say that my noble and learned friend Lord Tomlin agrees with the judgment which has been delivered.

Order of the Court of Appeal reversed and order of Rowlatt J. discharged. Case remitted back to the Commissioners with a direction to determine what deduction, if any, should be allowed in respect of each assessment on the basis that the amount of the outgoings referred to in para. 2 *of r.* 7 *of No. V. of the Rules applicable to Schedule A of the Income Tax Act,* 1918, *is to be ascertained separately as to each flat and as to each year of assessment. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.*

Lords' Journals, Jan. 29, 1932.

Solicitors for the appellants: *Charles Stevens & Drayton.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . APPELLANT;

AND

JACKSON . . . . RESPONDENT.

H. L. (E.)*
1932
Feb. 22.

Administration—Insolvent Estate—Debt due to Executor—Retainer—Crown Debt—Priority—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 34, 57, *Sch. I., Part I.—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*).

To the extent to which the Bankruptcy Act, 1914, when read with the Administration of Estates Act, 1925, confers priority upon Crown debts, an executor cannot exercise his right of retainer.

In re Ambler [1905] 1 Ch. 697 overruled unless distinguishable.

Decision of the Court of Appeal [1931] 1 Ch. 389 reversed.

APPEAL from an order of the Court of Appeal affirming a judgment of Clauson J. (1)

The respondent was the sole executrix of Norman A. L. Cockell, who died in 1929, and was universal legatee under his will. The testator's estate, which amounted to approximately 1000*l.*, was insolvent. The respondent was also a creditor of the testator's estate for 1000*l.*, being money lent by her to the testator, and she claimed to exercise her right of retainer in respect of this sum against the assets in her hands. The testator at his death owed a considerable sum to the Crown for arrears of taxes. The Crown alleged that eight years' arrears of income tax, amounting in all to 3197*l.*, and two years' arrears of super-tax, amounting in all to 1003*l.*, remained unpaid, and, in view of the insolvency of the testator's estate, claimed to be a preferential creditor under s. 33 of the Bankruptcy Act, 1914, in respect of the assessment for the year 1920–1921, being the largest assessment during the said eight years and amounting to 1913*l.* for income tax and super-tax.

The respondent took out an originating summons to have it determined: (1.) whether her right of retainer might be exercised against the Crown in priority to the Crown's preferential claim for property or income tax under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, and s. 34 of the Administration of Estates Act, 1925, and the First Schedule to that Act; (2.) whether the preferential claim of the Crown for property or income tax could be made (*a*) for property or income tax assessed for the year ending April 5 next before the testator's death and no other year, or (*b*) for property or income tax assessed for any one year before the testator's death.

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

(1) [1931] 1 Ch. 389.

Clauson J. decided the first question in favour of the respondent upon the ground that under s. 34 of the Administration of Estates Act, 1925, an executor's right of retainer was to be operative in respect of the whole of the assets of the deceased and as between the executor and the whole body of creditors, including the Crown. The Court of Appeal, by a majority (Lord Hanworth M.R. and Lawrence L.J.; Romer L.J. dissenting), affirmed the decision of the learned judge, in effect, upon the ground that the Crown had waived its prerogative right of priority in the administration of insolvent estates out of Court, and that the provisions of the bankruptcy law as to priority of debts did not constitute the creditors entitled to preferential payments thereunder creditors of a higher degree than the personal representative.

1931. Nov. 26, 27. *Sir William Jowitt A.-G.* and *J. H. Stamp* for the appellant. The right of retainer is exercisable in respect of debts of the same degree only, and under the Administration of Estates Act, 1925, the claim of the Crown to one year's arrear of assessed taxes is a claim of a higher degree than a claim to a simple contract debt of the deceased. According to the true construction of s. 34 of that Act, an executor, in exercising his right of retainer under sub-s. 2, is bound to observe the order of priority prescribed by sub-s. 1. Clauson J. was wrong in holding that the words "in respect of all assets" in sub-s. 2 had the effect of extending the right of retainer as against creditors of a superior degree; those words related simply to the class of assets upon which the retainer operated. The Court of Appeal did not accept Clauson J.'s construction of sub-s. 2, but the majority were wrong in holding that an executor was entitled to exercise his right of retainer so as to defeat the substituted preferential right of the Crown and all other preferential rights under sub-s. 1 of s. 34 and the First Schedule to the Act. Romer L.J. rightly took the view that the preferential rights in question constituted a class of liabilities of higher degree than the remaining liabilities of the insolvent's estate, and must therefore be provided for by the executor before he could exercise his right of retainer. Sub-s. 1 of s. 34, in its effect upon the executor's right of preference and retainer, is thus the converse of Hinde Palmer's Act, which placed specialty and simple contract creditors upon an equal footing: *In re Samson* (1) ; *In re Harris.* (2) *Lee* v. *Nuttall* (3), *In re May* (4), *In re Leng* (5), and *In re Ambler* (6) proceeded on the assumption that s. 10 of the Judicature Act, 1875, did not affect the right of retainer, but it is a novel doctrine to say that before the Act of 1925 there was a right to retain as against a creditor of a superior class, and if that is the effect of *In re Ambler* (6) it ought not to be followed.

Fergus Morton K.C. and *Norman Daynes K.C.* for the respondent. In assenting to be bound by the Administration of Estates Act, 1925, and by the relevant provisions of the Bankruptcy Act, 1914, the Crown has now waived its prerogative right of priority in the administration of insolvent estates out of Court in the same manner as it had already waived that right in the administration of such estates by the Court and in bankruptcy, with the result that the only right remaining in the Crown in respect of its claim for income tax is the limited preferential right of payment conferred on the Crown and certain other creditors by s. 33 of the Bankruptcy Act, 1914, and s. 34 of the Administration of Estates Act, 1925, and the First Schedule to that Act. This preferential right of payment does not constitute the creditors

(1) [1906] 2 Ch. 584, 592.
(2) [1914] 2 Ch. 395, 403.
(3) (1879) 12 Ch. D. 61, 64.
(4) (1890) 45 Ch. D. 499, 501.
(5) [1895] 1 Ch. 652, 657.
(6) [1905] 1 Ch. 697.

entitled to priority thereunder creditors of a higher degree, as against whom an executor cannot exercise his right of retainer. In *In re Leng* (1) it was held by the Court of Appeal that by the combined effect of s. 3 of the Married Women's Property Act, 1882, and s. 10 of the Judicature Act, 1875, in the administration by the Court of the assets of a deceased person whose estate might prove to be insolvent, the claim of the widow for money lent to the deceased for the purposes of his trade or business was postponed to the claims of his other creditors; but Lindley L.J. was careful to point out that the common law right of an executor or administrator to retain a debt due to himself was not affected by s. 10 of the Judicature Act, 1875, and he quoted *Lee* v. *Nuttall* (2) and *In re May* (3) in support of that proposition. If the priorities granted by the Bankruptcy Acts of 1883 and 1914 constituted the preferred debts debts of a higher degree, it follows that the same rule must apply where a debt is deferred by statute as where a debt is advanced, and on that hypothesis *In re Ambler* (4), which decided that s. 3 of the Married Women's Property Act, 1882, did not affect the right of retainer of a married woman who was the executrix of her deceased husband in respect of a loan made by her for the purposes of his business, must have been decided the other way. The importation of the Bankruptcy Rules is something which stands outside the common law right of retainer, which is the right of an executor to withdraw from the assets in his hands distributable in the bankruptcy amongst himself and other creditors of equal degree enough to pay himself in full: *In re Rhoades.* (5) The fallacy of the argument on behalf of the Crown is that the bankruptcy legislation constitutes creditors of different degrees.

[They also referred to *In re Gilbert* (6); *In re Henley* (7); *Woodward* v. *Darcy* (8); *Food Controller* v. *Cork.* (9)]

Sir William Jowitt A.-G. replied.

(1) [1895] 1 Ch. 652, 657.
(2) 12 Ch. D. 61.
(3) 45 Ch. D. 499.
(4) [1905] 1 Ch. 697, 701.
(5) [1899] 2 Q. B. 347, 354.
(6) [1898] 1 Q. B. 282.
(7) (1878) 9 Ch. D. 469.
(8) (1557) Plow. 184.
(9) [1923] A. C. 647.

The House took time for consideration.

1932. Feb. 22. LORD ATKIN. My Lords, the question in this case is as to the executrix's right of retainer. The testator died on June 19, 1929. By his last will he bequeathed the whole of his estate to the respondent, whom he appointed his sole executrix. The estate was obviously insolvent. In round figures the assets were worth about 1000*l.* The Crown had a claim for arrears of income tax and super-tax amounting to over 4000*l.*; there were other creditors for about 4000*l.*, including a claim by the executrix for about 1000*l.* for money lent. The executrix claims to retain the whole of the assets to satisfy her debt. The Crown dispute the right to retain any assets against their debt, claiming that the right of retainer does not operate against any part of their debt, or, alternatively, does not operate against so much of their claim as is given priority by the provisions of the Bankruptcy Act, 1914, s. 33, read with the Administration of Estates Act, 1925, s. 34, which is limited as "not exceeding in the whole one year's assessment." The meaning of the limitation does not arise on the appeal to this House.

Clauson J. and the majority of the Court of Appeal have decided in favour of the executrix, Clauson J. on the ground that the terms of the legislation place the Crown in the same position as any other creditor, and as the right of retainer is expressed to be exercisable as to "all assets of the deceased" the retainer must be available against the Crown. The majority of the Court of Appeal, the Master of the Rolls and Lawrence L.J., have held that the prerogative right of the Crown to priority is now regulated by the Bankruptcy Act; and that the result is that in administration the Crown cannot claim to be a creditor of higher degree than the personal representative. Romer L.J., on the contrary, has held that the executor can only exercise his right of retainer subject to the priorities constituted by the Bankruptcy Act, and that the retainer is subject in the present case to the claim of the Crown for taxes "not exceeding in the whole one year's assessment."

I think that the question can be solved by a short consideration of the common law right of retainer. The reason for it is to be found in the report in Plowden of the opinions of the judges of both the King's Bench and the Common Pleas in the case of *Woodward* v. *Darcy* (1), given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator's debt to himself unpaid. "But our law is not so unreasonable or uncharitable, for the executor may retain assets to pay himself notwithstanding he may not bring an action to recover it, for true it is that the action is gone by the act of administration." The reporter states: "This was the clear opinion of all the Justices of the one Bench and of the other, except Brook [Chief Justice of the Common Pleas] who was strongly of opinion against them, and it was the opinion of all the Serjeants also, as well of the rest of them as of Catline at last, who was of counsel for the plaintiff." The case shows the right of retainer well established, but does not refer to the limitation of the right to retain only against debts of equal degree. It did not arise in that case, where the action was in debt, and the plea averred a retainer of a debt due on a recognizance of the force of a statute staple. The limitation is, however, also well established. As stated by Blackstone, the law allows the executor to retain so much as will pay himself before any other creditors whose debts are of equal degree. We, therefore, are brought to consider what is meant by debts of equal or higher degree. "In payment of debts [the executor] must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate." For the purpose of administration the order of degree of debts was the order in which they were entitled to priority of payment. Such an order was established by common law. It was, of course, capable of being varied by statute; and accordingly in the order of degrees there found place debts which have been given priority by statute. Thus

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(1) Plow. 184, 185, 186.

Blackstone in stating the order says: "First, funeral and testamentary expenses. Secondly, debts due to the King on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen (30 Car. II., c. 3), money due on poor rates (17 Geo. II., c. 38) [this refers to money due from overseers of the poor], for letters to the Post Office (9 Anne, c. 10) [I cannot find this in the statute cited] and some others. Fourthly, debts of record; as judgments . . . . statutes and recognizances. Fifthly, debts due on special contracts; as for rent . . . . or upon bonds, covenants, and the like, under seal. Lastly, debts due on simple contracts." And it may be noted that as to the last class he adds: "Among these simple contracts servants wages are by some with reason preferred to any other: and so stood the ancient law according to Bracton and Fleta."

The same order is substantially maintained in Williams on Executors. In the first edition by Sir Edward Vaughan Williams in 1832, vol. ii., p. 654, the order of priority is set out. Next after debts due to the Crown by record or specialty appear "Certain specific debts which are, by particular statutes, to be preferred to all others." He cites the statutes referred to by Blackstone and adds The Friendly Society Act of 1793 (33 Geo. III., c. 54) and the Metropolis Act, 57 Geo. III., c. 29 (Local), in respect of money due from the deceased as collector to paving commissioners. The same order of degrees is maintained in succeeding editions. In the 11th ed., 1921, the only effective additions to the statutes are the Savings Bank Act, 1863, and the Workmen's Compensation Act, 1906, s. 5, sub-s. 3, so far as it relates to priority in bankruptcy.

Such statutes as have been referred to are instances where the legislature has thought fit to exalt simple contract debts to a higher degree of priority. Similarly debts of higher estate may be abased. This was the result of Hinde Palmer's Act, 1869, which in administration put specialty debts in the same degree as simple contract debts. The necessary result was, as held by Sargant J. in *In re Harris* (1), that an executor could retain for a simple contract debt against a specialty debt. Applying the above rules to the present facts it appears to me reasonably plain that the result of the priority section in the Bankruptcy Act when applied to the administration of estates by the Administration of Estates Act, 1925, is to place all the priority debts to the extent of their priority in the degree of debts "which are by particular statutes to be preferred to all others." The Bankruptcy Act alone would not have been sufficient; but once the priorities there mentioned are incorporated into the law as to administration, and the duty to observe them is imposed upon the personal representative, the debts to which preference is given appear to me at once to rise in the scale. The same result would necessarily follow in respect of the corresponding right of the executor to prefer creditors, which is similarly limited to a preference amongst creditors of equal degree. If this view be correct it appears not to be of great importance how we construe the words appended to the Administration of Estates Act, 1925, s. 34, sub-s. 2: "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors." The right still remains as before, the right to retain against debts of equal degree. Some debts have been put in a higher degree than they were before; but the executor's right always has been subject to changes of that description. What has been affected is not the right but the classes in respect of which the right is exercised. But if that is not the true meaning, then, in order to give any effect to the first words of the section, it becomes necessary to read "subject as aforesaid" as referring to sub-s. 1, just as in the First Schedule, Part I., the same words in r. 2 obviously refer to r. 1. I attach great importance to the fact that the saving applies to the right to prefer creditors in the same words as it applies to the right of retainer; and nothing will persuade me that it is consistent with the intention of the legislature as deduced from the language of the statute to give power to the administrator of an insolvent estate before any administration order to pay ordinary debts in preference to rates or taxes, wages of servants or workmen's compensation, the priority of which is now by the Workmen's Compensation Act, 1925, s. 7, sub-s. 3, unlimited in amount subject to the provision of the Act as to insurance.

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(1) [1914] 2 Ch. 395.

The question whether the personal representative can exercise his right of retainer against the debts which are directed to be paid pari passu will only arise in the present case if the Crown are wrong in their construction of the words "not exceeding one year's assessment." But as that event is at least possible I think it right to say that in my opinion there are now only two or possibly three degrees of priority of debts, being firstly those which are by the Bankruptcy Act expressly given priority, secondly those which are expressly directed to be paid pari passu and possibly thirdly those mentioned in s. 36 of the Bankruptcy Act and in s. 3 of the Partnership Act, the effect of the latter section being expressly retained in the Bankruptcy Act, s. 33. It follows that the balance of any Crown debt in excess of that portion which is given priority is now of the same degree as the debt of the executrix in the present case and that she can retain against such balance.

The difficulty which the Courts below experienced in deciding this matter was the line of authority *Lee* v. *Nuttall* (1); *In re May* (2); *In re Leng* (3); culminating in *In re Ambler* (4), which decided that, notwithstanding the terms of the Married Women's Property Act, 1882, which would postpone in bankruptcy a wife's proof for a debt lent by her to her husband for the purposes of his trade, the wife, if executrix of her husband, could retain such a debt against trade creditors. It is a curious instance of how a series of decisions, none of which are of binding force on this particular matter, gradually assume authoritative influence. *Lee* v. *Nuttall* (1) had nothing to do with degrees of debts. It only decided that the executor was not a secured creditor and that s. 10 of the Judicature Act did not make him a secured creditor, and in that sense did not apply to retainer. In fact s. 10 did not incorporate any provisions of the Bankruptcy Act as to priorities; and no question of priority or even of proof arose. *In re May* (1) was a case where the widow executrix had lent money to her husband for the purposes of his trade. There had been an administration order. The estate was insolvent and the bankruptcy rules as to priority had been introduced into such an administration by the Preferential Payments in Bankruptcy Act, 1888, s. 5. North J. held that the executrix could retain, relying on the supposed decision in *Lee* v. *Nuttall* (2) that the Judicature Act, 1875, s. 10, did not affect the right of retainer. In *In re Leng* (3) it was held that the effect of the Married Women's Property Act, 1882, s. 3, and the Judicature Act, 1875, s. 10, in the administration of an insolvent estate after an administration order was to postpone the claim of the widow in respect of a loan to which the Married Women's Property Act applied. No question of retainer arose; but Lindley L.J. said that the decision of the Court was not inconsistent with *In re May* (1) that the law of retainer had not been altered, and that s. 3 of the Married Women's Property Act was not addressed to that subject. In *In re Ambler* (4) the judges followed the dicta in *In re Leng* (3), though both Farwell J. and Stirling L.J. would have themselves decided otherwise. I do not think that there was any decision constraining the Court of Appeal to decide *In re Ambler* (4) as they did. It may be that the decision can be supported by reference to the more restricted rules as to the effect of the Bankruptcy Act governing the administration of estates under an order of the Court before the Act of 1925. And it is possible that the position of debts covered by s. 36 of the Bankruptcy Act which, by sub-s. 2, takes the place of the Married Women's Property Act, 1882, s. 3, may at some future time be held not to be in a lower degree than the debts to which they are postponed, though I cannot foresee the reason for so holding. But I am satisfied that, unless *In re Ambler* (4) can be distinguished in some such way, it should not be followed in this House so as to

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(1) 12 Ch. D. 61.
(2) 45 Ch. D. 499.
(3) [1895] 1 Ch. 652.
(4) [1905] 1 Ch. 697.

(1) 45 Ch. D. 499.

(2) 12 Ch. D. 61.

(3) [1895] 1 Ch. 652, 657.

(4) [1905] 1 Ch. 697.

defeat what appears to me to be a very plain application of the well established law relating to retainer. I am of opinion that to the extent to which the Crown's claim for taxes is given priority in bankruptcy it is a debt of higher degree than that of the executrix in this case and that she cannot exercise her right of retainer in priority to such claim, and that the first question in the summons should be answered accordingly. The appeal should be allowed, and the judgments below should be set aside and a declaration should be made as above stated.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Atkin, and that of my noble and learned friend, Lord Tomlin, which is about to be read; I concur therein and cannot usefully add anything.

LORD TOMLIN (read by LORD MACMILLAN). My Lords, the question to be determined in this case is whether an executrix can retain out of the insolvent estate of her testator her own simple contract debt as against a Crown debt for taxes.

To find the answer it is, I think, necessary to examine a series of statutes beginning with the Administration of Estates Act, 1869 (commonly called Hinde Palmer's Act), and ending with the Administration of Estates Act, 1925.

It would have been noteworthy if a number of statutes extending over so many years had not generated some cases upon their construction. They have, in fact, done so, and these cases also require consideration.

Now the right of retainer as it stood before it was affected by statute was a right on the part of the legal personal representative to retain out of legal assets actually or constructively in his possession any debt due to him from the deceased as against all creditors whose debts were of equal degree with or of lower degree than his own. The priority in which debts by law fell to be paid determined the degrees.

The Crown had priority over the subject in respect of specialties and debts of record. Other Crown debts had priority over the debts of the subject of equal degree.

Subject to the rights of the Crown, the order of priority of the payment of debts was as follows :—

(1.) Debts to which particular statutes give priority.
(2.) Judgments in Courts of Record.
(3.) Recognizances and statutes, e.g., statutes merchant.
(4.) Debts by specialty.
(5.) Debts by simple contract.

The right of retainer, unlike in this respect the right to prefer, was not interfered with by a decree for administration, and the legal personal representative could retain out of legal assets come to his hands after decree, for it was said that the decree did not affect the legal priorities of creditors and that there was therefore no distinction between assets possessed prior to the decree and assets possessed subsequent to it : see *Nunn* v. *Barlow*. (1)

In 1869 the first material change was made.

By s. 1 of the Administration of Estates Act, 1869, it was enacted as follows : "In the administration of the estate of every person who shall die on or after the first day of January one thousand eight hundred and seventy no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt ; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding : Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

This section does not in terms refer to or purport to deal with the right of retainer. It does, however, alter priorities in administration by abolishing the existing priority of specialties and by making specialties and simple contract debts of equal degree. It also directs that these debts shall be paid out of the assets accordingly.

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(1) (1824) 1 Sim. & St. 588.

It has been held that as a result of this section a simple contract debt can be retained as against a specialty, not, as I understand it, because there has been any alteration in the right of retainer itself, but because a change has been made in the field in which the retainer operates, and because the effect of the direction for payment out of the assets pari passu of specialties and simple contract debts was to convert creditors on specialty and simple contract into creditors of equal degree: see *In re Samson* (1) and *In re Harris*. (2)

In the Bankruptcy Act, 1869, provision was made (s. 32) for payment in bankruptcy of specified debts including certain assessed taxes in priority to all other debts, the preferred debts ranking equally inter se, and it was enacted that subject to these preferences all debts should be paid pari passu. The order of priorities prescribed by this Act differed from the order of priorities in administration. In particular there was no priority for Crown debts beyond that in respect of some assessed taxes.

The Act also provided (see s. 49) that an order of discharge should not release a bankrupt from debts due to the Crown.

Under the Act it was held that the Crown was not bound except by the sections in which it was referred to: see *In re Bonham*. (3)

The next step was that certain of the rules in bankruptcy were by s. 10 of the Supreme Court of Judicature Act, 1875, introduced into the administration by the Court of insolvent estates of deceased persons.

That section, so far as material, was as follows: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the cost of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

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(1) [1906] 2 Ch. 584.

(2) [1914] 2 Ch. 395.

(3) (1879) 10 Ch. D. 595.

It is to be noted: (1.) that this section applies to the administration of insolvent estates only when they are being administered by the Court (see *In re Laycock* (1)), so that thereafter the rules governing an administration by the Court differed from those governing an administration by the legal personal representative out of Court, and (2.) that the rules of bankruptcy introduced into a Court administration were limited to those relating to certain specified matters not in terms covering the priorities of debts.

There followed conflicting decisions as to whether the rules as to bankruptcy priorities were introduced by this section: see *In re Albion Steel and Wire Co.* (2) and *Association of Land Financiers.* (3) The question was later on treated as set at rest by the Preferential Payments in Bankruptcy Act, 1888, the provisions of which I shall presently mention.

The only other case up to this point requiring notice is *Lee* v. *Nuttall* (4), which, in my view (notwithstanding an expression of opinion to the contrary by North J. in *In re May* (5)), decided nothing more than that the legal personal representative was not by reason of his right of retainer in the position of a secured creditor in the administration by the Court of an insolvent estate.

(1) [1919] 1 Ch. 241.
(2) (1878) 7 Ch. D. 547.
(3) (1881) 16 Ch. D. 373.
(4) 12 Ch. D. 61.
(5) 45 Ch. D. 499.

In 1882 the Married Women's Property Act, 1882, was passed. Sect. 3 of that Act was as follows: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

This section purported to regulate the position in the bankruptcy of the husband of the wife who had lent money to the husband for the purposes of his business.

The position of the wife under the combined effect of this section and s. 10 of the Act of 1875 fell to be considered in some later cases to which I shall hereafter refer.

The next relevant Act was the Bankruptcy Act, 1883, which replaced the Act of 1869.

This Act, by s. 10, in effect re-enacted the provisions of the Act of 1869 as to priorities, with some modifications, and provided that, subject to the provisions of the Act, all debts proved in the bankruptcy should be paid pari passu.

It also provided (s. 30) that, with certain exceptions, which covered a limited class of Crown debts, all debts should be released by the order of discharge.

By s. 125 power was given to the Court in bankruptcy to administer in bankruptcy the estate of a deceased debtor where the Court was not satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the deceased's debts.

By s. 150 it was provided that the provisions of the Act as to (inter alia) the priorities of debts and the effect of an order of discharge should bind the Crown.

At this stage in the history of the legislation it is to be observed: (1.) that the Crown was clearly bound by the priority provisions in any bankruptcy proceedings; (2.) that there was nothing to introduce into the administration of insolvent estates by the Court, outside the bankruptcy jurisdiction, the bankruptcy rules as to the priorities of debts, if such rules were not introduced by s. 10 of the Supreme Court of Judicature Act, 1875; and (3.) that, nevertheless, where an order was made under s. 125 for the administration in bankruptcy of a deceased person's estate the bankruptcy rules as to priorities of debts undoubtedly applied.

In this state of affairs the question was bound to arise, and did, in fact, later on arise, as to the effect upon retainer of an administration under s. 125. The answer given was that the executor still had the right of retainer, and that the Official Receiver could not take as against the executor more than the creditors could have taken: see *In re Rhoades*. (1) It is to be observed, however, that in this case there was not any question of priorities. There is nothing, therefore, in this decision inconsistent with the view that, though the right of retainer continued as against the Official Receiver, the field in which it operated was determined by the priorities prevailing in the bankruptcy administration.

Next came the Preferential Payments in Bankruptcy Act, 1888.

By s. 1, sub-s. 1, some further modification was made in bankruptcy priorities. By s. 1, sub-s. 6, it was provided that s. 1 of the Act should apply in the case of a deceased person who died insolvent as if he were a bankrupt and as if the date of his death were substituted for the date of the receiving order.

By s. 3 the Act is made to apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made after the commencement of the Act.

In *In re Leng* (2), referred to more fully later on, the Court of Appeal took the view that s. 1, sub-s. 6, of the Act of 1888 extended the bankruptcy priorities of debts to the administration in the Chancery Division of insolvent estates.

The position had now developed to a point at which the question might arise as to how the legal personal representative stood in regard to his retainer where the estate was

(1) [1899] 2 Q. B. 347.

(2) [1895] 1 Ch. 652.

being administered in the Chancery Division, the priorities of debts in bankruptcy being regarded as applicable to that administration.

In *In re May* (1), where the administration order in the Chancery Division was made after this Act of 1888 had come into force, it was held by North J. that a widow, the executrix of her deceased husband, was entitled to retain a debt which would have been postponed in bankruptcy by reason of s. 3 of the Married Women's Property Act, 1882.

This decision appears to have been based upon three grounds —namely : (1.) that s. 3 did not apply at all, because the event referred to therein, i.e., the husband becoming bankrupt, had not occurred ; (2.) that s. 10 of the Act of 1875 only imported certain rules which were not wide enough to cover the particular case ; and (3.) that the last mentioned section did not affect the right of retainer.

The effect of the Act of 1888 does not appear to have been considered.

A few years later in *In re Leng* (2) the widow of an insolvent testator, having lent money to her husband for his business, was held by the Court of Appeal to be postponed to other creditors in a Chancery administration action on the ground that s. 3 of the Act of 1882 constituted one of the rules as to debts provable in bankruptcy and was therefore imported into the administration by s. 10 of the Act of 1875.

Here there was no question of retainer, and in distinguishing *In re May* (1) Lindley L.J. said : " The Legislature has not yet thought proper to alter the law of retainer, and section 3 of the Married Women's Property Act is not addressed to that subject."

It may be observed that in this case Lindley L.J. assumes that s. 1, sub-s. 6, of the Act of 1888 had introduced bankruptcy priorities into the administration of an insolvent estate in the Chancery Division. The effect of s. 3 of the Act of 1888 does not seem to have been considered, but Stirling J., in *In re Heywood* (3), treated himself as bound to

(1) 45 Ch. D. 499.
(2) [1895] 1 Ch. 652.
(3) [1897] 2 Ch. 593.

regard the decision in *In re Leng* (1) as one made upon consideration of s. 3 of the Act of 1888.

Finally, in *In re Ambler* (2), the Court of Appeal, basing themselves to some extent upon dicta in *In re Leng* (1), held that by the combined effect of s. 3 of the Married Women's Property Act, 1882, and s. 10 of the Act of 1875, a widow's debt, due from her husband in respect of his business, was postponed in proof and distribution, but that her right of retainer was not affected.

The Bankruptcy Act, 1914, replaced the Acts of 1883 and 1888 without material alteration so far as concerned the matter under consideration. Sect. 33 of the new Act regulated debt priorities, the assessed taxes to which priority is given being limited to those "not exceeding in the whole one year's assessment." Sect. 130 was substituted for s. 125 of the Act of 1883.

Now the position at this stage upon the statutes and the decided cases may, it seems to me, be summarized as follows :—

(1.) The bankruptcy priorities were introduced into the administration of the estate of a deceased insolvent both in an administration in bankruptcy and in an administration in the Chancery Division, but were not introduced into such an administration conducted by the legal personal representative out of Court.

(2.) If the administration of a deceased's insolvent estate began out of Court, but was at a later stage continued under an order for administration, the order of the priorities of debts would change in the course of such administration.

(3.) The Crown in administration in bankruptcy and in the Chancery Division had lost its priority under the general law and was only entitled to the limited priority conferred by the bankruptcy rules.

(4.) The right of retainer continued to be exercisable whether the administration took place out of Court, in bankruptcy or in the Chancery Division.

(1) [1895] 1 Ch. 652. (2) [1905] 1 Ch. 697.

(5.) The priorities of debts by reference to which the retainer operated was in the case of administration out of Court the old order of priorities, but in the case of administration in bankruptcy or in the Chancery Division there was room for doubt. There was no decision in connection with administration in bankruptcy as to the priorities by reference to which the right of retainer was to be exercised, but *In re Ambler* (1) is, I think, only consistent with the view that in an administration in the Chancery Division regard must be had to the old priorities in exercising such right.

In this position of affairs the Administration of Estates Act, 1925, was passed.

That Act provided as follows :—

Sect. 34 : " (1.) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act.

(2.) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors.

(3.) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

Sect. 57 : " (1.) The provisions of this Act bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall for the time being, as respects the estates of persons dying after the commencement of this Act, but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on His Majesty in right of His Crown, or His Duchy of Lancaster, or on the Duke of Cornwall, may be instituted."

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(1) [1905] 1 Ch. 697.

"FIRST SCHEDULE.

Part I.

Rules as to Payment of Debts where the Estate is Insolvent.

(1.) The funeral, testamentary, and administration expenses have priority.

(2.) Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

It will be observed (1.) that s. 34, sub-s. 1, in effect reproduces s. 10 of the Supreme Court of Judicature Act of 1875 with the modifications resulting from the Act of 1888, and extends the operation of the provisions as to the bankruptcy rules, expressly including those relating to debt priorities to all classes of administration of insolvent estates whether in Court or out of Court, and (2.) that the first paragraph of s. 34, sub-s. 2, enlarges the right of retainer and the right to prefer so as to be capable of exercise in respect of all assets, that is, equitable as well as legal, but limits the right of retainer to debts owing to the legal personal representative in his own right.

The first three words of the second paragraph of sub-s. 2—namely, "subject as aforesaid," in my opinion, refer only to the provisions of the first paragraph of that sub-section. To my mind, the position of these words is conclusive on this point.

As the new Act applies the bankruptcy rules to the whole area of administration, i.e., both in Court and out of Court, there cannot be any case of an insolvent estate where the administration will be governed by any other rules.

In all cases all debts (with the exceptions to which priority is given) must be paid pari passu. The Crown has lost its old priority and can now only claim the limited priority conferred by the exceptions from the general equality. In other words, there has been a complete alteration by statute of the priorities, and therefore of the degrees of debts in the whole field of insolvency, the only field in which the rights to retain and to prefer have any importance or value.

In these circumstances I think that the principle applied in construing Hinde Palmer's Act (where words directing payment similar to those of the Bankruptcy Act are to be found) should be applied in construing the Act now under consideration: see *In re Harris.* (1)

The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed, and it is in the field as so changed that the rights in question must to-day operate.

The result is that all debts fall within one or other of two degrees. There are no other degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees he can retain against all creditors of whichever degree they may be. If, however, his debt falls within the lower degree he can retain against all creditors of such degree, but against none in the higher degree.

This is not, I think, inconsistent with my reading of the second paragraph of s. 34, inasmuch as s. 34, sub-s. 2, deals only with the nature of the rights themselves.

This view of the matter avoids the many difficulties which would arise if the rights to retain and to prefer (and in this respect the two rights cannot, I think, be distinguished) were to be governed by priorities differing from those which determine payment of debts.

It is, however, difficult to reconcile with the decision in *In re Ambler.* (2) It is true that that case was decided upon different statutes and at a time when the whole field of insolvency was not occupied by the bankruptcy rule of

(1) [1914] 2 Ch. 395.

(2) [1905] 1 Ch. 697.

H. L. (E.)
1932
ATTORNEY-GENERAL
v.
JACKSON.
Lord Tomlin.

priorities of debts, and on these grounds some distinction may be founded. I am satisfied, however, that, whether distinguishable or not, it ought not to afford a guide to your Lordships' House in resolving the question now under consideration.

My conclusion, therefore, is that in the present case there was no right to retain against the Crown so far as the Crown has priority under the bankruptcy rules affecting debt priorities. The point raised by the second question of the originating summons as to how much of the Crown's debt is covered by the priority given by those rules has not yet been considered by the Courts below.

It is proper at this point to add a word with regard to the judgments given in the Court of first instance and in the Court of Appeal.

With all deference to Clauson J., I am unable to accept his view as to the effect of extending to all assets the right to retain and to prefer. This extension seems to me to do nothing more than for the purposes of these rights to put legal and equitable assets on the same footing.

Again, with all respect, I am unable to accept the reasoning of the majority of the Court of Appeal by which they reach the conclusion that the right of retainer is available against the Crown. The matter must, I think, be regarded in the way which I have indicated, with the result that in my opinion the appeal should be allowed. There should be a declaration that to the extent of the priority conferred by the Bankruptcy Act upon Crown debts the right of retainer cannot be exercised, and the case should be remitted to the Chancery Division to determine the second question on the originating summons as to the extent to which the Crown debt has priority.

LORD MACMILLAN. My Lords, for myself I desire to express my entire concurrence with the judgment of my noble and learned friend, Lord Tomlin, which I have just read, and also with the judgment of my noble and learned friend, Lord Atkin.

LORD ATKIN. My Lords, I am asked to say that my noble and learned friend, Lord Buckmaster, concurs in the judgments which have been delivered.

Order of the Court of Appeal reversed. Declared that to the extent of the priority conferred by the Bankruptcy Act upon Crown debts, the right of retainer cannot be exercised. Cause remitted back to the Chancery Division with a direction to determine the second question on the originating summons as to the extent to which the Crown has priority, with liberty to apply, and to do therein as shall be just and consistent with this judgment. The appellant to pay the costs of the appeal to this House.

Lords' Journals, Feb. 22, 1932.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Keene, Marsland, Bryden & Besant.*

[HOUSE OF LORDS.]

H. L. (E.)* STEDEFORD . . . . APPELLANT;

1932

AND

March 11. BELOE . . . . RESPONDENT.

Revenue—Income Tax—Pension to Headmaster on Retirement—Voluntary Payment—Chargeability to Income Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, 40), *Schedule E—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

The Governing Body of a school, which was a corporation founded by Royal Charter, in exercise of their powers under the charter, granted an annual pension out of the school funds to a headmaster on his retirement. There was no scheme in existence under which the headmaster could have qualified for a pension, and the Governing Body had the right at any time to rescind the minute under which the pension was granted and to cease making payments to him:—

Held, that the pension was not chargeable to income tax under Schedule E as amended by the Finance Act, 1922, s. 18.

Duncan's Executors v. *Farmer* 1909 S. C. 1212; 5 Tax Cas. 417 distinguished.

Decision of the Court of Appeal [1931] 2 K. B. 610 affirmed.

APPEAL by the Crown from a decision of the Court of Appeal (1) affirming a decision of Rowlatt J., whereby an appeal from the Commissioners for the Special Purposes of the Income Tax Acts was dismissed.

The question raised by the appeal was whether the Rev. R. D. Beloe (now deceased) was liable to income tax for the year of assessment ending April 5, 1929, under the provisions of Schedule E of the Income Tax Act, 1918, as amended by s. 18 of the Finance Act, 1922, in respect of a pension granted to him by the Governing Body of the college after the determination of his office of headmaster of Bradfield College.

The facts are fully stated in the report of the case before the Court of Appeal, and sufficiently appear from the opinion of Viscount Dunedin.

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

(1) [1931] 2 K. B. 610.

The Special Commissioners held that the payment of the pension was purely a voluntary payment, and was not chargeable to income tax.

Rowlatt J. upheld the determination of the Commissioners, and his judgment was affirmed by the Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.).

Sir Boyd Merriman S.-G. and *Reginald Hills* for the appellant. It is conceded that this particular annuity is not annexed to the office of headmaster because it is paid to the recipient after the determination of the post of headmaster, but it may still be an annuity unconnected with the office and chargeable to income tax under Schedule D, and now under Schedule E as amended by the Finance Act, 1922, s. 18. The Crown is bound to admit that there is here no binding contract for payment of the annuity, and the question is whether this is a regularly constituted annuity, there being in form no certioration, but de facto an expectation, that the annuity will continue to be paid. In ordinary parlance this is a pension, and it is submitted that that is sufficient to bring it into charge.

[They referred to *Duncan's Executors* v. *Farmer* (1) and *Seymour* v. *Reed*. (2)]

Latter K.C. and *Cyril King* for the respondent, the executrix of the Rev. R. D. Beloe, were not called upon.

VISCOUNT DUNEDIN. My Lords, in this case the Governing Body of Bradfield College, who are a corporation founded by Royal Charter, have funds under their control, one of the matters to which they are allowed to apply their funds, if they wish, being to give allowances and pensions to persons who have been headmasters in their school. They did, upon the retirement of the respondent to this case, grant him a pension. It is admitted in the case that no consideration was given by him for the granting of the pension and that, as a matter of fact, it depends entirely on the good will of the Governing Body, who might at any time, if they wished,

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(1) 1909 S. C. 1212; 5 Tax Cas. 417.

(2) [1927] A. C. 554.

Viscount Dunedin.

rescind the minute under which they granted the pension and the pension would be no longer payable. In these circumstances, the question before us is whether this payment to the respondent is chargeable to income tax.

Now, that it is not chargeable under the old Schedule E is quite clear from the case of *Duncan's Executors* v. *Farmer.* (1) It is not given to him in respect of his office as headmaster, because he no longer holds that office of headmaster. It is only given to him because he is no longer headmaster.

Then we have the later statute which says that "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E"—so we are there referred to Schedule D. Now it must be a real profit under Schedule D, and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is merely a casual payment which depends upon somebody else's good will.

It was sought by the Crown to show that something else had been held by the Court of Session in the case of *Duncan's Executors* v. *Farmer* (1), and, as has been pointed out, in that case it was held that while Duncan was not liable under Schedule E, he was liable under Schedule D. The point there was that an annuity had been granted upon consideration that he should give up the parish entirely—that is, not have an assistant and successor, but go out of the parish altogether. There is no question that if the annuity had not been paid Duncan might have sued for the annuity. I think that that, although not said in actual words, is absolutely deducible from the opinion that I pronounced in that case.

My Lords, in these circumstances I am of opinion that here the payment is purely voluntary and cannot be subjected to income tax, and I move your Lordships that the appeal be dismissed with costs as between solicitor and client.

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(1) 1909 S. C. 1212; 5 Tax Cas. 417.

LORD WARRINGTON OF CLYFFE. My Lords, I agree. It is not here contended that the pension in the present case is a profit from the headmaster's employment as headmaster, for the simple reason that it was not given to him until he had finally resigned his office. Then is it a profit or gain under Schedule D ? This question can, in my opinion, be answered in only one way. Here each payment is wholly voluntary. The case is only an instance of a succession of voluntary payments, each of which is voluntary and none of which need necessarily be continued.

LORD THANKERTON. My Lords, I concur, and I just wish to say a word about the case of *Duncan's Executors* v. *Farmer*. (1) I think the opinion of the noble Viscount on the Woolsack in that case made absolutely clear what the nature of the payment in that case was, and he distinguished it from *Turner* v. *Cuxon* (2), which was the case of a discretionary allowance from a Curates' Augmentation Fund, in these words: "That case" (i.e. *Turner's*) "did not go on to hold, as I have done, that the payment there fell under Schedule D, for this reason, that it was not an annuity. It was a mere donation given each year with no certioration that it would be repeated the year following; whereas here there is a regularly constituted annuity by the society." My Lords, in *Duncan's Executors* v. *Farmer* (1) there was a regularly constituted annuity by the society for consideration afforded by the minister, as my noble and learned friend has pointed out. One could not find better words to describe the present case than the contrasted words used by my noble and learned friend: "It was a mere donation, given each year with no certioration that it would be repeated the year following." That appears to me exactly to describe the grant in the present case, and accordingly I concur in the motion proposed by my noble and learned friend on the Woolsack.

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(1) 1909 S. C. 1212, 1216; 5 Tax Cas. 417, 424.

(2) (1888) 22 Q. B. D. 150.

H. L. (E.)
1932
STEDEFORD
v.
BELOE.

LORD MACMILLAN. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs as between solicitor and client.

Lords' Journals, March 11, 1932.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Crossman, Block, Matthews & Crossman.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
March 15.

HEARTS OF OAK ASSURANCE COMPANY, LIMITED . . . . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . . RESPONDENT.

Insurance (Industrial)—Insurance Company—Appointment by Industrial Assurance Commissioner of Inspector to investigate Affairs of Company—Right to hold Inquiry in Public—Friendly Societies Act, 1896 (59 *&* 60 *Vict.* c. 25), *s.* 76, *sub-s.* 5—*Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, c. 8), *s.* 17, *sub-s.* 1.

An inspector appointed by the Industrial Assurance Commissioner under s. 17, sub-s. 1, of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of an industrial assurance company is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him to carry out his duty under the statute; and he is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by s. 76, sub-s. 5, of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the company and for purposes ancillary thereto.

The same principle applies where the Commissioner himself makes the examination:—

So *held* by Lord Warrington of Clyffe, Lord Atkin, Lord Thankerton, and Lord Macmillan; Viscount Dunedin dissenting.

Decision of the Court of Appeal [1931] 2 Ch. 370 reversed.

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

APPEAL from a decision of the Court of Appeal affirming a decision of Luxmoore J. (1)

The action was brought by the appellant company for declarations that an inspector appointed by the Industrial Assurance Commissioner under s. 17, sub-s. 1, of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of the company (1.) was not bound to conduct such examination in public, (2.) was not entitled to conduct such examination in public, and (3.) was not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the sub-section or by s. 76, sub-s. 5, of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purpose of preparing his report to the Commissioner.

The material provisions of the Industrial Assurance Act, 1923, and of the Friendly Societies Act, 1896, are set out in the opinions of Lord Thankerton and Lord Macmillan.

On December 7, 1929, the Commissioner appointed Mr. John Fox to be inspector for the purpose of examining into and reporting on the affairs of the company. Under the powers conferred upon him by the Industrial Assurance Act, 1923, and also by s. 76, sub-s. 5, of the Friendly Societies Act, 1896, the inspector required the production of various books and documents of the company. After he had examined the said books and documents the inspector, on June 19 and 20, 1930, held a meeting at the Town Hall, Newcastle-upon-Tyne, for the purpose of examining on oath certain persons whose evidence he wished to obtain. The meeting was held in public, and the inspector had given notice thereof to the local newspaper offices to enable their reporters to attend. In his opening statement the inspector made public information he had obtained whilst examining into the affairs of the company, and he then proceeded to examine on oath officers, agents and servants of the company and others touching the affairs of the company. On July 16, 1930, the inspector held a further meeting at the City Hall, Cardiff, under his appointment. The appellants objected to the meeting being held in public, but the inspector overruled their objection, and newspaper reporters were again present and the inspector proceeded publicly to examine witnesses on oath.

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(1) [1931] 2 Ch. 370.

The appellants requested that the inspector should cease holding examinations into their affairs under s. 17 in public, but the inspector informed them that he proposed to proceed with his examination on the basis that the inquiry was a judicial proceeding, and as such must be held in public.

The appellants thereupon issued the writ in this action. Luxmoore J. held that the examination might be held at the discretion of the Commissioner, either in public or in private, or partly in public and partly in private, and the Court of Appeal by a majority (Lawrence and Romer L.JJ.; Lord Hanworth M.R. dissenting) affirmed his decision.

The arguments are fully reported in the report of the case before the Court of Appeal.

1932. Feb. 18. *Pritt K.C.* and *J. H. Stamp* (with them *Blanco White*) for the appellants.

Sir Thomas Inskip A.-G. and *Sir Boyd Merriman S.-G.* (with them *Stafford Crossman*) for the respondent.

After the case had been fully argued it was adjourned for a short time with a view to a settlement. No settlement was arrived at, but, in the event of the appeal being allowed, counsel agreed upon a form of order, which was handed to their Lordships.

The House took time for consideration.

1932. March 15. LORD THANKERTON. My Lords, on December 7, 1929, the Industrial Assurance Commissioner, in terms of s. 17, sub-s. 1, of the Industrial Assurance Act, 1923, appointed an inspector to examine into and report on the affairs of the appellant company. In the course of conducting that examination, a question arose as to whether the inspector was entitled to conduct the examination in public, and, after certain correspondence between the company and the Commissioner, the present action was brought by the company in order to have the matter settled.

The material part of s. 17 of the Act of 1923 is as follows :—

"17.—(1.) If, in the case of any collecting society or industrial assurance company, in the opinion of the Commissioner there is reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, the Commissioner or any inspector appointed by him for the purpose shall have power to examine into and report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-section (5.) of section seventy-six of the Friendly Societies Act, 1896, to an inspector appointed under that section.

(2.) On himself holding such an inspection or on receiving the report of an inspector so appointed the Commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein and in particular may in the case of a society award that the society be dissolved and its affairs wound up, and in the case of a company may present a petition to the court for the winding up of the company."

Sub-s. 5 of s. 76 of the Friendly Societies Act, 1896, provides as follows : "(5.) An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly."

It may be added that under s. 45, sub-s. 2, of the Act of 1923, where the Commissioner awards that a collecting society be dissolved and its affairs wound up, the society is entitled to appeal against the award to the High Court, or in the case of a society registered in Scotland to the Court of Session.

In the present case the Commissioner did not make the examination himself but appointed an inspector, but it seems clear that the decision in the present case will equally apply where the Commissioner himself makes the examination.

There is no express provision either in the Act of 1923 or in the Act of 1896 as to whether the examination is to be in public or in private, or as to any discretionary power in the matter. The solution of the question, in my opinion, will rest mainly on a consideration of the nature and purpose of the examination.

In their statement of claim the appellants seek the following relief, namely :—

"(1.) A declaration that an inspector appointed by the Industrial Assurance Commissioner under section 17, sub-section (1.), of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of the plaintiffs is not bound to conduct such examination in public.

"(2.) A declaration that an inspector appointed by the Industrial Assurance Commissioner under the said sub-section for the said purpose is not entitled to conduct such examination in public.

"(3.) A declaration that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by section 76, sub-section (5.), of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purpose of preparing his report on the affairs of the plaintiffs."

Although the respondent originally maintained in his defence that the inspector was bound to hold the examination in public, he did not oppose the first declaration asked for before this House, but maintained that the inspector had a discretionary power.

It appears to me to be clear that the object of the examination is merely to recover information as to the company's affairs and that it is in no sense a judicial proceeding for the purpose of trial of an offence ; it is enough to point out that there are no parties before the inspector, that he alone conducts the inquiry, and that the power to examine on oath is confined to the officers, members, agents and servants of the company. The information so gained by the Commissioner, either by himself or from the report of an inspector, will enable him to decide whether to take action under sub-s. 2 of s. 17. If he takes so serious a view of the situation as, in the case of a society, to award dissolution or, in the case of a company, to petition for winding up, the society or company respectively will have the opportunity of having the whole matter judically investigated, in the case of a society in an appeal, and, in the case of a company, by opposing the petition.

While the Industrial Assurance Commissioner may be said to act generally in the public interest, his main function is the protection of the industrial policy-holders, and a claim to the power to admit the public to these examinations must not be confused with the admission of policy-holders ; indeed, it is easy to conceive circumstances under which the admission of the public might be prejudicial to the interests of the policy-holders.

Except in so far as the statutory provisions otherwise direct, it seems to me that the affairs either of a collecting society or of an industrial assurance company are their own domestic matter, and that, therefore, in the absence of any statutory provision providing otherwise, the examination under s. 17 of the Act of 1923 ought not to be conducted in public. The Commissioner cannot properly deal with the situation disclosed by the examination until the latter is completed, and it would seem to be of importance that the credit of the society or company and the confidence of its policy-holders should not be open to any risk before the Commissioner has decided on what steps, if any, it is expedient for him to take. If the examination were to be held in public, it might well be that unfavourable opinions as to the financial position of the society or company might be prematurely and wrongly formed in the minds of the public or the policy-holders either through reports in the press or as the results of attendance at the examination of some of the persons to be examined on oath. The action of the inspector in the present case does not appear to have been very wise, but I have regarded the question as a general one, unaffected by indiscretions in this particular case.

The examination authorized by s. 17 of the Act of 1923 is very different from the familiar form of public inquiry by a departmental official, where parties interested are entitled to attend and be heard. The nearest analogy to the present case is to be found in s. 135 of the Companies Act, 1929, under which the Board of Trade is entitled to appoint inspectors to investigate the affairs of a company and to report thereon; the provisions are very similar, except that the Board of Trade can only so act on the application of a prescribed number of shareholders, and that if the Board, on receipt of the report, are of opinion that an offence has been committed they are to refer the matter to the criminal authorities. It has been held that an investigation under the corresponding provisions of the Companies Act, 1862, is not a judicial proceeding: see *In re Grosvenor and West-End Ry. Terminus Hotel Co.* (1) The reasons against publicity in such an investigation would be equally strong in my opinion.

I may add that I agree with the views expressed by the learned Master of the Rolls, who dissented in the Court of Appeal.

I am therefore of opinion that the appellants are right in their contention, and on this footing counsel for both parties were able to submit an agreed form of declaration for the consideration of your Lordships, the learned Attorney-General expressing himself as satisfied that the public interest would be sufficiently safeguarded thereby. The declaration thus suggested was as follows:—

"Declare that an inspector appointed by the Industrial Assurance Commissioner under section 17 (1.) of the Industrial Assurance Act, 1923, for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute.

"Declare that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and

(1) (1897) 76 L. T. 337.

by section 76, sub-section (5.), of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto."

While the agreement of parties cannot relieve your Lordships of the duty of putting a proper construction on the Act of Parliament, I am of opinion that a declaration in those terms will accurately express the conclusion to which I have come on the matter, and I, therefore, agree with the motion proposed.

LORD MACMILLAN. My Lords, the purpose of these proceedings is to obtain a judicial determination of the question whether as a matter of law the inspection of the affairs of an industrial assurance company, for which provision is made by s. 17 of the Industrial Assurance Act, 1923, must be conducted in private. The appellant company so contends. The Attorney-General, who appears in the public interest, while originally maintaining that the inspection must be conducted in public, is now content to maintain that the inspection may at discretion be conducted either in public or in private. The statute itself is silent on the subject, and your Lordships have accordingly to undertake the responsibility of inferring what was the intention of Parliament in the matter from other provisions of the Act.

The widespread activities of industrial assurance companies and collecting societies, to both of which the Act applies, have very properly engaged the special attention of Parliament in view of the importance of preventing abuses in their administration, and s. 17 of the Act of 1923 provides a valuable means of detecting and bringing to book delinquents. The section forms one of a group of five under the general heading, "Accounts, Returns, Inspection, Valuations, Meetings," and the first sub-section enacts as follows: "17.—(1.) If, in the case of any collecting society or industrial assurance company, in the opinion of the Commissioner there is reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, the Commissioner or any inspector appointed by him for the purpose shall have power to examine into and report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-section (5.) of section seventy-six of the Friendly Societies Act, 1896, to an inspector appointed under that section."

Sect. 76, sub-s. 5, of the Friendly Societies Act, 1896, reads as follows: "76.—(5.) An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly."

The Commissioner referred to is the Chief Registrar of Friendly Societies, who by s. 2, sub-s. 1, of the Act of 1923 is constituted "the authority charged with such powers and duties in relation to industrial assurance as are conferred and imposed upon him by this Act," and in this capacity is designated the Industrial Assurance Commissioner.

As to the executive action which may follow on the inspection, s. 17, sub-s. 2, provides that "on himself holding such an inspection or on receiving the report of an inspector so appointed the Commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein and in particular may in the case of a society award that the society be dissolved and its affairs wound up, or in the case of a company may present a petition to the court for the winding up of the company." A collecting society may appeal to the High Court against a dissolution award by the Commissioner: see s. 45, sub-s. 2. It will thus be seen that in the case of an industrial assurance company the Commissioner can take effective action on the inspection and report only by means of an application to the Court, while in the case of a collecting society his action may be reviewed by the Court, so that in either case the inspection may ultimately be followed by judicial proceedings. Under

s. 17, sub-s. 3, the Commissioner is given power, subject to appeal, to direct that the expenses of an inspection shall be defrayed out of the funds of the society or company, or by the officers or former officers, or members or former members of the committee of management or board of directors of the society or company, to be recoverable by him summarily as a civil debt. Sect. 39 imposes penalties on any collecting society or industrial assurance company which fails to comply with any of the provisions of the Act or any directions given by the Commissioner thereunder.

I think I have now collected all the passages in the Act which can provide any material to assist your Lordships in discharging the somewhat embarrassing duty of determining from what Parliament has said on other matters what it must be held to have intended on the point at issue, as to which it has omitted to say anything. Fortunately the indications to be derived from these passages are sufficiently significant.

It will be observed in the first place that the Commissioner may institute an inspection, not only when in his opinion there is reasonable cause to believe that a statutory offence has been committed, but also if in his opinion there is reasonable cause to believe that a statutory offence is likely to be committed. From this it appears that the investigation may be of a very delicate nature, and it can hardly have been contemplated that publicity should be given to suspicions, however reasonably entertained, that an offence was likely to be committed. Then it will be noticed that the Commissioner may either himself conduct the inspection or entrust it to an inspector appointed by him for the purpose. The object manifestly is that the Commissioner may either by himself directly or through the medium of a delegate obtain the information necessary to enable him to decide what action, if any, he should take. The cardinal words of the section are those which empower the Commissioner or his inspector "to examine into and report on the affairs of the society." It seems a little odd that the Commissioner should be empowered to report to himself, but at any rate this is clear, that the inspection is intended to be a proceeding of a purely preliminary character. It is obviously appropriate to conduct in private an investigation of such a character, designed as it is to inform the mind of a responsible official so that he may be able to decide whether he should or should not take any overt action, especially when the investigation may be initiated merely on reasonable suspicion of the probability of some irregularity having occurred. Indeed the very nature of the procedure directed is suggestive. An inspection of a company's books and documents and an examination of its officials are naturally conducted not in a public place but at the private premises where the books are kept and the officials are to be found. If the inspection may legally be conducted in public then any part of the proceedings may be so conducted, and it is as inconceivable as it would be impracticable that an examination of the books of a company should be carried out in the presence of the public.

If Parliament had intended that the inspection should or might be conducted as a public inquiry one would have expected to find in the Act the familiar provisions which are inserted when a public inquiry is contemplated. These in the present instance are conspicuously absent. Not only are there no directions for the public notification of the time and place of meeting, but there is also no provision for the parties under suspicion being afforded any indication of the offences of which they are suspected, or being permitted to be represented or defend themselves in any way, although, if the Attorney-General is right, the as yet unverified suspicions of the Commissioner or his inspector may be made public and communicated to the press. Anything more repugnant to elementary ideas of fairness and propriety it would be difficult to conceive.

Apart from these general considerations, however, there is one clue to the intention of the statute which your Lordships may well find conclusive. It so happens that in providing for the inspection in question Parliament has followed closely the terms in which it has provided for the analogous investigations of the affairs of joint stock companies by inspectors appointed by the Board of Trade. These inspections are now

H. L. (E.)
1932
HEARTS OF OAK ASSURANCE CO. v. ATTORNEY-GENERAL.
Lord Macmillan.

conducted under s. 135 of the Companies Act, 1929, which takes the place of s. 109 of the Act of 1908 in force when the Industrial Assurance Act of 1923 was passed. Previously inspections were provided for under s. 56 of the Companies Act of 1862. This system of inspection has thus been in existence for some seventy years. Your Lordships have been informed that such inspections under the Companies Acts have from the inception of this legislation been invariably in practice conducted in private. When Parliament borrowed the system of inspection from the company code and applied it to industrial assurance companies and collecting societies, it must be assumed that it was so applied in the knowledge of the existing practice and with the intention that this practice should be followed.

In deciding such a question as the present there are two main considerations to be kept in mind. On the one hand it is important to secure that the efficiency of the procedure for the purpose in view is not impaired. On the other hand it is not less important to ensure that fair treatment is accorded to all concerned. I am satisfied that both these ends can best be attained by the holding of such inspections in private. I can well imagine that irreparable harm might unjustly be done to the reputation of a company and much anxiety unnecessarily occasioned to its policy-holders by giving publicity to such preliminary investigations. The Commissioner on the completion of the inspection might find himself gravely embarrassed in deciding what action he should take by agitation created for or against the company by premature publicity. What has happened in the present case, where the inspector took it upon himself to hold a public sitting at which he made a number of statements seriously affecting the appellants, affords an indication of the inexpediency of any publicity at the inspection stage, particularly when the task of inspection is entrusted to persons without judicial experience. The Attorney-General urged that it was desirable that abuses where they existed should be made known at the earliest moment, and that publicity might have the advantage of bringing forward witnesses who could give useful evidence.

I can see every reason for speedy action in the interests of the numerous policy-holders of such companies whenever abuses have been ascertained to exist, but it is quite a different matter to give publicity to the process of obtaining the information on which the Commissioner has to decide whether or not an offence has been proved to exist and on which action may or may not follow. I may add that it is at least doubtful whether the person conducting such an inspection has any authority to examine witnesses other than the officers, members, agents and servants of the company.

In the course of the discussion, which was most helpfully and reasonably conducted on both sides, counsel offered to assist the House by agreeing upon a formula which should define the position in the event of your Lordships coming to the conclusion that the statute did not authorize the conduct of inspections in public. They suggested that in that event your Lordships might pronounce as follows: "Declare that an inspector appointed by the Industrial Assurance Commissioner under section 17 (1.) of the Industrial Assurance Act, 1923, for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute.

"Declare that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by section 76, sub-section (5.), of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto."

I am of opinion that your Lordships may adopt the language thus provided as accurately defining the position under the statute. The result is that the appeal will be allowed and a declaration made in the terms quoted.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading the opinions of my noble and learned friends, Lord Thankerton and Lord Macmillan, and I concur therein.

LORD ATKIN. My Lords, the judgments that have just been delivered by my noble and learned friends, Lord Thankerton and Lord Macmillan, so entirely express my own judgment on the matter that I find it unnecessary to add any words of my own. I agree in the motion proposed.

VISCOUNT DUNEDIN. My Lords, I am sincerely glad that your Lordships see your way to adhibit your imprimatur to the very sensible form of declaration which the Attorney-General has said he would be content with if he is not right in his absolute contention. I say this because I think that every consideration of good taste and proper feeling point to the advisability of an inquiry of this sort being held in private. But, as the Attorney-General has not actually waived the point, I am bound to say that I cannot myself see my way to laying it down that the inquiry should be in private, even under the conditions proposed. I say this for this reason : I do not think it is a judicial proceeding which must be held in public ; privilege in it would be qualified and not absolute privilege. But the statute does not say whether it is to be in public or in private, and therefore I cannot see how a Court of law can have power to say that it must be in private simply because it thinks that conditions of expediency all point that way.

The argument that weighed with me most in favour of the opposite view was that drawn from the admitted practice as to inspections under the Companies Act. But had the question that is raised here been raised in such a case, I feel I should have felt myself entitled to say that the practice had so long existed that it had, so to speak, been crystallized into something equivalent to a direction in the Act itself. That cannot be said here, and I feel myself unable to say that a Court of law could give a declaration or pronounce an injunction which would make the holding of an inquiry in public illegal. I am, therefore, obliged formally to dissent from the judgment, while at the same time fully approving of its result.

Order of the Court of Appeal reversed. Declared that an inspector appointed by the Industrial Assurance Commissioner under section 17 (1) *of the Industrial Assurance Act*, 1923, *for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute: And that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said subsection and by section* 76 (5) *of the Friendly Societies Act*, 1896, *or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, March 15, 1932.

Solicitors for the appellants: *Kingsley Wood, Williams & Co.*

Solicitor for the respondent: *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
Feb. 23.

HOARE AND COMPANY, LIMITED . . APPELLANTS;

AND

COLLYER . . . . RESPONDENT.

Revenue—Income Tax—Profits of Trade—Deduction of Expenses — Brewery Company—Tied Houses—Premiums paid by Tenants — Rent forgone for Purposes of Trade — Loss of Rent on certain Tied Houses owing to Tie — Profit Rentals on other Tied Houses—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D, Rules applicable to Cases I. and II., r.* 3.

A brewery company owned freehold and leasehold licensed houses, which they let to tenants who were tied to the company for all the beer, wines and spirits sold on the premises let to them. Under the decision in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433, the company, where rent was forgone by reason of the tie, was entitled, in the computation of the profits of the trade for assessment under Schedule D to income tax, to a deduction of the difference between the Schedule A assessment of its freehold houses or the rents paid by the company for its leasehold houses, on the one hand, and the rents received by it from the tied tenants, on the other hand, as an expense wholly incurred for the purposes of its trade. Some of the tied tenants paid premiums, and it was admitted, in the course of the hearing, that they must be taken into account in determining whether rent had been forgone by the company by reason of the tie. In some cases the company suffered a loss in respect of rent forgone, but in other cases the rents received by the company exceeded the annual value or the rent paid by the company, as the case might be. In assessing the company to income tax under Case I. of Schedule D the Crown claimed that the amount of such excess should be brought into account under Schedule D, but so far only as was required to wipe out the debit above mentioned, and that for this purpose the whole of the houses must be aggregated:—

Held, that the claim of the Crown failed, on the ground that the profits and gains arising from the ownership of land, whether used for the purposes of trade or not, were determined exclusively by reference to annual value under Schedule A, and that accordingly the rents received could not be included in an account under Schedule D of the profits and gains of the trade for the purposes of which the land was used.

Fry v. *Salisbury House Estate, Ld.* [1930] A. C. 432 applied.

Usher's Wiltshire Brewery, Ld. v. *Bruce* [1915] A. C. 433 explained and followed.

Decision of the Court of Appeal [1931] 1 K. B. 123 reversed.

* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

H. L. (E.)
1932
HOARE & Co. v. COLLYER.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Slesser and Romer L.JJ.) (1), reversing an order of Rowlatt J. whereby an appeal by the Crown upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the decision of the Commissioners was affirmed.

The question raised by the appeal related to the computation of the profits of the trade of the appellants, who were brewers, for the purpose of assessment to income tax under Case I. of Schedule D of the Income Tax Act, 1918, and was whether, in the application of the principle of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2), allowing a deduction in computing profits on account of rent forgone or lost by brewers who let to tied tenants licensed houses at less than the fullest rent which would be obtainable if the houses were let free of any tie, the licensed houses were to be taken as a whole and the loss ascertained by reference to the rents and premiums received in respect of the whole of the houses, or whether each house was to be taken separately, so that any loss upon the letting of one house could be deducted without regard to any gain upon another.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the head note.

1931. Nov. 27, 30. *Latter K.C.* and *Cyril King* for the appellants. It being settled law that the annual value of premises exclusively used for business premises is properly to be deducted in arriving at the balance of profits and gains under Schedule D (*Russell* v. *Town and County Bank, Ld.* (3)), this House has decided in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) that where brewers own a number of freehold and leasehold licensed premises which they let to tied tenants at less than the full rent for the sake of the tie, if, in the case of a freehold house, the rent paid by the tenant is less than the amount of the assessment under Schedule A, or, in the case of a leasehold house, is less than the rent paid by the brewers to the head lessor, the difference between the rent

(1) [1931] 1 K. B. 123.

(2) [1915] A. C. 433.

(3) (1888) 13 App. Cas. 418, 425.

received by the brewers and the annual value or the rent paid by the brewers, as the case may be, may be treated as an expense wholly incurred by the brewers in earning the profits of their trade and therefore as a debit item in their account of profits and gains under Schedule D. To determine this question each house must be considered separately, and in any case where it is shown that rent has been forgone by reason of the tie, that can be brought in as a deduction from trade profits. In the present case in some instances the rents received by the brewers were less, but, in some instances, by reason of premiums paid by the tenants, were more than the annual value or the rent which the brewers paid, and in those instances it is conceded that no deduction can be claimed. In some cases it is true that a profit has been received from the rents, but in *Fry* v. *Salisbury House Estate, Ld.* (1), it has been held by this House that rents received from land or houses cannot be included as trade receipts for the purpose of arriving at the balance of profits and gains under Schedule D. Cases in which no claim for loss of annual value or rent arises must therefore be disregarded. The decision of the Court of Appeal that there must be an aggregation of profits and losses arising from the maintenance of all the tied houses of the appellants involves the inclusion of profits arising from lands in the computation of trade profits for the purposes of Schedule D, and is inconsistent with *Fry* v. *Salisbury House Estate, Ld.* (1) The decision of the Court of Appeal amounts to this, that deductions which are allowable for the purposes of Schedule D may be cancelled by incomings which are not profits within that Schedule. Schedule A and Schedule D are mutually exclusive. In *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) the several lettings were in fact aggregated as a matter of convenience, but all the tied houses were let at less than their annual value, and the question at issue in the present appeal did not arise.

Sir Thomas Inskip A.-G. and *Reginald Hills* for the respondent. *Fry* v. *Salisbury House Estate, Ld.* (1), does not prevent effect being given to the clear implication of *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) The loss, if any, incurred by the appellants in their capacity of landowners in providing a market for the sale of their liquors cannot be ascertained in accordance with the principle of that decision, except by looking at the result of all the lettings of the tied houses, and to ignore such lettings where there is a profit and have regard only to those where there is a loss cannot be right. On commercial principles the cost to the brewers of providing a market place for their beer must be taken as a whole. The respondent is not seeking to go contrary to the *Salisbury House* case (2); he is not seeking to use the rents in any way so as to increase the tax.

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(1) [1930] A. C. 432.

(2) [1915] A. C. 433.

Latter K.C. replied.

The House took time for consideration.

1932. Feb. 23. LORD BUCKMASTER (read by LORD MACMILLAN). My Lords, the appellants are a limited company carrying on the business of brewers, and owning a number of licensed houses, many of which are let to tenants who are compelled to acquire from or through the appellants all beers, wines, and spirits sold upon the premises so let. They also own a number of free houses, but the question in the present case does not apply to them. All these houses are assessed under Schedule A, at amounts fixed by determining the annual value for purposes of the Schedule, a value which may be less or more than the rent actually paid under the lease or agreement which creates the tenancy. So far as the tied houses are concerned, if in any case rent paid by the tenant is less than the amount of the assessment under Schedule A, it has been decided in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) that the appellants are entitled in preparing their accounts for assessment under Schedule D to deduct as an expense the difference between the rent received and the Schedule A assessment. The principle underlying this decision is that such houses were solely and exclusively acquired for the purpose of the appellants' trade,

(1) [1915] A. C. 433.

(2) [1930] A. C. 432.

and that by means of their exclusive use as a channel for the sale of the appellants' goods, the profits upon which they are to be taxed under Schedule D are earned. They are in fact regarded as business premises of the undertaking. The decision referred to places that point beyond controversy. In the present case, while accepting that principle, the Commissioners for Inland Revenue have sought to treat all the tied houses as a single entity, and, by bringing in the surplus rent which in certain cases the appellants receive over and above the Schedule A assessment, they seek to reduce the amount of the allowances to which the appellants are entitled in cases where the rent is below such assessment, and by this means to modify the amounts they are allowed to charge as expenses in their profit and loss account by virtue of the decision in *Usher's* case. (1)

The Commissioners for Special Purposes decided the dispute in favour of the appellants, and their opinion was confirmed by Rowlatt J., but reversed by the Court of Appeal. The judgment of the Court of Appeal depends upon the view that the decision in *Usher's* case (1) treats the business as a whole, and regards the provision of all the houses, treated as one entity, as part of the business. I find it difficult to follow this reasoning from examination of the case, nor does it seem to me consistent with the effect of the case of *Fry* v. *Salisbury House Estate, Ld.* (2), which decided that profits made from dealing with house property subject to assessment under Schedule A over and above the amount of such assessment, were not subject to tax. From this decision it would follow that if in all the houses in the present case there had been excess rentals that excess could not be taxed, but where, as here, the assessments are in some cases above and in some cases below the rent, the fact of using the rent to reduce the allowances to which the appellants were entitled where the rents were deficient would result in causing the appellants to pay the tax upon the surplus rents, and that notwithstanding the decision in *Fry's* case (2), which distinctly holds that such surplus rents are immune.

(1) [1915] A. C. 433.

(2) [1930] A. C. 432.

The assessments under Schedule A are each of them separate assessments in respect of each separate house, and in respect of each such house in appropriate conditions the principle of *Usher's* case (1) applies, and I find it difficult to see how the allowances the appellants are thereby entitled to make can be reduced because in a totally distinct property different conditions apply. I can see no ground upon which all the houses can be made into one, and unless they are so unified the appellants are entitled to succeed.

I am not quite clear as to the extent to which the question of premiums received is still a matter of controversy, but it ought not to be difficult of determination. In all cases where rents are below the Schedule A assessment, the premiums received in respect of such houses must be brought into the account for the purpose of determining what is the actual expense to which the appellants have been put in maintaining the house as part of their business. The actual method by which the premium is so to be dealt with is not before us, but it ought not to be difficult of calculation.

For these reasons, I think the appellants are entitled to succeed, the judgment of the Court of Appeal should be set aside, and the judgment of Rowlatt J. restored.

LORD WARRINGTON OF CLYFFE. My Lords, the appellants, Hoare & Co., Ld., are the well known brewers of that name. They are the owners of a large number of "tied" houses, some freehold and some leasehold. They let these houses to publicans who are under an obligation to take their supply of beer exclusively from the appellants. In the case of some of these houses they are let at rents less than the annual value under Schedule A in the case of freeholds and less than the head rent in the case of leaseholds. The appellants also in some cases bear the expense of repairs and other expenses usually falling on tenants. They accept these reduced rents and make these payments for the purpose of thereby increasing the quantity of beer taken by the tenants and thus enhancing the profits of their trade as brewers. It is not disputed by the Crown that under the decision of this House in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) the difference between the actual rent taken and the annual value or the rent payable to the head lessor, as the case may be, and the amount of the expenses so incurred may be treated as costs wholly incurred in earning the profits of their trade, and therefore as a proper debit item in the account of profits and gains under Schedule D of the Income Tax Act. In some cases, however, the rents received by the appellants exceed the annual value or the rent as the case may be, and the Crown contend that the amount of such excess must be brought into the account under Schedule D, but so far only as is required to wipe out the debit above mentioned, and that for this purpose the whole of the houses must be aggregated instead of treating each house as a separate item of assessment as it is under Schedule A.

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(1) [1915] A. C. 433.

This contention of the Crown, which is disputed by the appellants, raises the whole question now in dispute between the parties.

The Commissioners and Rowlatt J. decided this question in favour of the appellants, but the Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) took the opposite view. Hence this appeal.

A further point was raised in the Courts below. In some cases the appellants charged and received a premium in addition to the rent, and the Crown contended that such premium ought to be taken into account in calculating the amount of the difference between the rents paid by tenants and the annual value or the head rent as the case may be—namely, in ascertaining whether in particular cases the receipts from the houses were in fact less than the annual value or the head rent. It is now conceded by the appellants that the premiums should in some way be taken into account, and therefore this question is not now in issue, and the sole question is that stated above.

The solution of this question depends in my opinion upon the true effect of *Usher's Brewery* case (1), and of the more recent decision in this House of *Fry* v. *Salisbury House Estate, Ld.* (1)

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(1) [1915] A. C. 433.

Before coming to a consideration of these cases, however, it is well to remind oneself of the relevant provisions of the Income Tax Act. Tax under Schedule A is to be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom for every 20*s*. of the annual value thereof. It is quite clear from the General Rule No. 1 for ascertaining this annual value that for this purpose each item separately let must be taken by itself. Under this Schedule, therefore, the aggregation contended for by the Crown has no place.

To turn now to Schedule D, r. 5 relating to Cases I. and II. provides that the computation of tax shall be exclusive of profits or gains arising from lands, tenements, hereditaments or heritages occupied for the purpose of the trade. It is also provided by r. 3 that no sum shall be deducted in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade.

It seems to me to be now settled by the authority of *Fry* v. *Salisbury House Estate, Ld.* (1) that the profits and gains arising from the ownership of lands, whether used for the purposes of a trade or not, are determined exclusively by reference to annual value, and not by the result of an account of receipts on the one hand and expenses on the other, and that accordingly the rents received cannot be included in an account under Schedule D of the profits and gains of the trade for the purposes of which the lands are used.

Usher's case (2) is in no way inconsistent with this view. All that was decided in that case was that certain expenses incurred by the owners and certain items of rents forborne by them for the purpose of extending their trade might properly be treated as money wholly and exclusively laid out or expended for the purposes of such trade, and therefore forming a proper item of debit in the account under Schedule D. The Crown do not contend, and could not in my opinion

(1) [1930] A. C. 432.

(2) [1915] A. C. 433.

H. L. (E.)
1932
HOARE & Co. v. COLLYER.
Lord Warrington of Clyffe.

successfully contend, that this principle does not apply to the cases of the houses in the present case in which the rents have been forborne or expenses incurred as above mentioned. What they say is that the excess of rents over annual value in the case of other houses should be set off against the deficiency, conceding that this should be done only so far as is necessary to wipe out the deficiency as a debit item in the account under Schedule D. The concession seems to me to make no difference; either the rents come into the account or they do not. If they do then they must come in as a credit item whether or not it is more than sufficient to wipe out the debit item. It reminds me of the concession, unsuccessfully offered in *Fry's* case (1), that the annual values should be allowed as a reduction from the rents there sought to be included in the account under Schedule D.

The fact is that the claim of the Crown really depends on the contention that houses should be treated as an aggregate mass so that a loss or expenditure in respect of certain items making up that mass should be wiped out by a surplus of receipts in others. In my opinion there is no authority for this view. It is true that in the record of *Usher's* case (2) the totals of the sums representing rents forborne and expenses incurred are alone stated, but in my opinion that was only done as a matter of convenience to avoid setting out a large number of small items making up those total sums.

There is no suggestion in the case that the decision in any way turned upon the absence there of any such surplus as exists or is said to exist here. The question this House has to decide did not arise.

Items of receipt and expenditure respectively cannot in my opinion be set off one against the other unless they are both properly included in one account. In the present case, although the rents forborne and the expenses incurred in the case of certain houses form a proper item of debit in the account under Schedule D, the rents received in the case of other houses are excluded from that account under the authority of *Fry's* case. (1)

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(1) [1930] A. C. 432.

(2) [1915] A. C. 433.

For these reasons I am of opinion the claim of the Crown fails, and this appeal should be allowed with costs here and below, and the decisions of Rowlatt J. and the Commissioners should be restored.

The case, however, should be remitted to the Commissioners to determine what sum in each case in which a premium was charged should be added to the rent in respect of such premium.

LORD ATKIN. My Lords, the solution of the problems presented by this case does not appear difficult in view of decisions of your Lordships' House. The appellants, who are brewers, own about 600 leasehold or freehold licensed houses let to tenants who are tied to the appellants for all the beer, wine and spirits sold in the house. They also own a few free houses, with which this case is not concerned. The question arises in respect of the assessment of the appellants to income tax under Schedule D. When the tied tenant pays a rent in the case of leasehold houses less than the rent payable by the appellants, or in the case of freehold houses less than the Schedule A valuation, the appellants have treated the difference as a trade expense, following the decision in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) The Crown raise no objection to this, but make two contentions. They say:—

1. There ought to be brought into account the sums which other tied tenants pay in excess of the Schedule A valuation or of the rents paid by the appellants so far as is necessary to compensate the alleged expense, but no more.

2. In calculating the amount of the rent actually received from the tied tenant there should be brought into account any premiums paid by the tenant when his lease was granted. And this would apply both to determine the amount of the actual expenses charged in each case, and also to ascertain the excess amounts which are relevant under contention 1.

My Lords, it appears to me plain that the first contention is ill-founded. Whether the expense allowed in *Usher's* case (1) is based upon a deduction of the Schedule A valuation as on premises used in the brewers' business, mitigated by the sum received from the tied tenant, or whether it is regarded as a notional sum paid for the advantage of the tie, it is allowed as an expense incident to the particular house in respect of which it is incurred. It in no way differs from expenses for repairs or compensation levy or insurance premiums on particular houses such as are also authorized by the same decision. They do not cease to be particular because the sum of them can be expressed in one total and is so brought into the account. When brought in they rank as debit items in the general account of profits for Schedule D purposes. The reason why the surplus rents cannot be set against them is that such rents find no place in a Schedule D account. The decision in *Fry* v. *Salisbury House Estate, Ld.* (1) makes this clear. Applying the words of Lord Dunedin: "You cannot bring out that balance of profit without taking the rents I receive in computo. Now, these rents are also part of my income or property, and the statute says that any income which represents the value of real property is to be assessed in the manner directed under Schedule A." It makes no difference whether you are seeking to establish a balance of profit or destroy an item of loss. It is in the present case admitted by the Crown that they cannot bring in the totality of rents paid and received into the Schedule D account. I see no justification in law or in business for taking a department of the trade, "a tied house rent department," and investigating whether that showed a profit or a loss, rejecting the loss, but not charging the profit. The fact is that if the Crown's contention were to prevail the whole of the rent accounts would have to be brought into account on both sides in order to show whether there was a general profit or a loss. And this is exactly what is prohibited by the *Salisbury House* case. (2) If such a procedure as is contemplated here were permissible I cannot see any reason why it should not extend to other expenses, such as repairs and insurance premiums, which has never yet been suggested. I think, therefore, on the first issue the Crown fails.

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(1) [1915] A. C. 433.

(1) [1930] A. C. 432, 440.

(2) [1930] A. C. 432.

On the second contention, however, I think that they are clearly right, though the application in this case will be limited to the particular houses in respect of which deductions are claimed. The cases where premiums are concerned only appear to number about thirty. Counsel for the appellants agreed that premiums should be taken into account for the purpose of ascertaining the true rent actually paid by the tied tenant. What was suggested was that where it could be shown that a premium of equivalent amount would also be paid with a higher rent without a tie, the diminution in rent should be treated as paid for the tie. The only question seems to me to be whether the tied rent plus the premium is in fact less than the Schedule A valuation or the rent paid by the appellants on freehold or leasehold houses respectively. If it is not, there is no expense which can be brought into account. The case must go back to the Commissioners for them to assess the figures where premiums are concerned. The appeal must be allowed and the order of the Court of Appeal varied in accordance with your Lordships' decision.

LORD TOMLIN (read by LORD THANKERTON). My Lords, there is one principle of income tax law which is now indisputable—namely, Schedule A and Schedule D are concerned with distinct subject-matters of taxation, and hereditaments are necessarily taxed under Schedule A, even though they belong to one whose business is the letting of them. Further any hereditament the rent of which exceeds the Schedule A valuation, being taxable under Schedule A and Schedule A alone, is immune from taxation under Schedule D in respect of such excess: see *Fry* v. *Salisbury House Estate, Ld.* (1)

The subject carrying on a trade or business is entitled to treat as a deduction in the account prepared for the purposes of Schedule D any expenses exclusively incurred in earning his profits.

In *Russell* v. *Town and County Bank, Ld.* (2) your Lordships' House was of opinion that where a manager was allowed living accommodation in part of the bank's business premises free of rent, the annual value of that part of the premises occupied by the manager could be treated by the bank as an expense incurred in earning the profits, because it was in effect an addition to his salary.

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(1) [1930] A. C. 432.

(2) 13 App. Cas. 418.

In *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), where tied houses of a brewery company were held by the tenants at rents below the Schedule A valuations, your Lordships' House, as I understand the case, treated the difference between the rent and the valuation in the case of each house as rent forgone, or money spent exclusively for the purpose of earning profits, and held that expense to be one which could be deducted for the purpose of ascertaining profits and gains under Schedule D.

In the present case the brewery company held many tied houses, in respect of some of which the rents received were in excess of the Schedule A valuations, and in respect of others of which the rents received were less than the Schedule A valuations.

The Crown, while admitting that the excess of rents over valuations cannot in respect of any house be taxed under Schedule D, maintains that the brewery company is not entitled to be allowed by way of deduction anything from the account for rent forgone in respect of any house the rent of which is less than the Schedule A valuation, but is only entitled to a deduction if on an account taken of the rents of all the tied houses it be shown that the total rents are less than the total of the Schedule A valuations.

Rowlatt J. decided in favour of the appellants, but the Court of Appeal have acceded to the arguments of the Crown, and the brewery company appeals to your Lordships' House.

I cannot bring myself to think that the contention of the Crown is consistent with the decisions already given by your Lordships' House.

No such account as the Crown contends for was, as I read the case, referred to or contemplated by your Lordships in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) It is true the

(1) [1915] A. C. 433.

items in respect of several houses were in that case aggregated and referred to as one sum, but that was, I think, merely a matter of convenience and not because any account of rents had to be taken.

In effect, the Crown is seeking to bring into charge under Schedule D the thing, or part of the thing, which admittedly is not chargeable at all—namely, in the case of every house where the rent exceeds the Schedule A valuation, the amount of the excess. It does not seem to me to be any the less a bringing into charge because the thing, or the part of the thing, brought in is brought in for the purpose of wiping out deficits arising in cases where the rents do not equal the Schedule A valuations.

In my opinion, therefore, the Crown's contention on this point ought not to prevail.

Upon the minor point whether, where the tenant has paid a premium, regard ought to be had to that premium in estimating the rent actually paid, the Crown is in my opinion right in contending that the premium must be taken into account. Indeed the point was in effect conceded by the appellants at the bar.

In my judgment the appeal should be allowed, the case being remitted to the Commissioners to assess the figures in the cases where premiums have been paid.

LORD MACMILLAN. My Lords, the assessed annual value of each of the tied licensed houses of which the appellants are the freehold or leasehold proprietors is admittedly the subject of taxation under Schedule A. The annual value assessed in the prescribed statutory manner on which the tax is levied is in some cases less and in some cases more than the rents which the appellants in fact receive from those to whom they let their houses. Where the rent received by the appellants is less than the assessed annual value, the appellants, in virtue of the decision of this House in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), are entitled, in computing the balance of the profits of their business for the purpose of assessment to income tax under Schedule D, to deduct the difference as an expense necessarily incurred in earning their profits. It is not suggested that, in the converse case, where the rent received by the appellants is in excess of the assessed annual value, they should be required to carry the excess to the credit of their profits under Schedule D; but it is submitted that before the total of the deficiencies to be deducted is ascertained there should be set off against those deficiencies the excesses received, in diminution pro tanto of the deduction to be made. The deduction, it is admitted, cannot be converted into an addition by bringing the excesses into computation, but it is argued that they may be utilized up to the point of extinguishing the deductible deficiencies altogether.

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(1) [1915] A. C. 433.

I am of opinion that this is not permissible under the Income Tax Acts, however reasonable it may appear. It has been definitely settled by the decision of your Lordships' House in *Fry* v. *Salisbury House Estate, Ld.* (1), that rents received by the owners of property, the annual value of which is taxed under Schedule A, cannot be assessed to any effect under Schedule D, notwithstanding that the rents so received exceed the annual value on which the tax under Schedule A has been levied. The present contention of the respondent is in my opinion clearly untenable in view of that decision, for his contention is that a part at least of the rents received shall be reckoned in the computation of the profits of the appellants' business—namely, that part of the rents which is in excess of the assessed annual value. No doubt he does not put it that way, but that is in effect what he asks, for to use part of the rents in diminution of a deduction from the profits is just to that extent to add the rents to the profits.

As regards the estimation of the rent where a premium has been paid by the appellants' tenants, I am clearly of opinion that in such cases regard must be had to the premium paid.

The appeal should accordingly be allowed and the appropriate order pronounced.

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(1) [1930] A. C. 432.

Order of the Court of Appeal discharged and order of Rowlatt J. restored. Case remitted back to the Special Commissioners with a direction to determine in each case in which a premium was charged and the rent received was below the Schedule A assessment, or the rent paid as the case may be, what sum should be added to the rent received in respect of such premium for the purpose of determining what, if any, is the actual expense to which the appellants have been put in maintaining the house as part of their business. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, Feb. 23, 1932.

Solicitors for the appellants: *Godden, Holme & Ward.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

J. C.*
1932
Feb. 23.

MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED AND OTHERS . . } APPELLANTS;

AND

CITY OF OUTREMONT . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Municipal Law—Municipal and School Taxes—Gas Mains—"Immoveables"—"Land"—Jurisdiction of Superior Court—Civil Code, art. 376—*Code of Civil Procedure, art.* 54—*Cities and Towns Act* (*R. S. Q.*, 1925, *c.* 102), *ss.* 521, 534, 537—*Education Act* (*R.S.Q.*, 1925, *c.* 133)—*Protestant School Act* (15 *Geo.* 5, *c.* 45; *Queb.*), *s.* 16.

Gas mains laid under public streets in the Province of Quebec are "immoveables" within the meaning of art. 376 of the Civil Code, as they are buildings (bâtiments); they are accordingly subject to municipal taxes by s. 521 of the Cities and Towns Act (R. S. Q., 1925, c. 102), and therefore to school taxes under the Education Act (R. S. Q., 1925 c. 133) and the Protestant School Act, 1925.

The word "land" in the Cities and Towns Act includes "immoveables," and consequently under s. 534 the occupier or possessor of the gas mains is liable for the taxes jointly and severally with the owner.

A municipal corporation suing in the Superior Court for municipal taxes can claim also school taxes which it is authorized to collect by the Acts above mentioned; provisions of those Acts impliedly repeal to that extent art. 54 of the Code of Civil Procedure.

Montreal Light, Heat and Power Consolidated v. *City of Westmount* [1926] S. C. R. 515 approved.

Judgment of the Court of King's Bench, Appeal Side (1930) Q. R. 49 K. B. 456 affirmed.

APPEAL (No. 45 of 1931) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (October 30, 1930), affirming a judgment of the Superior Court (December 1, 1929).

The respondent city brought an action in the Superior Court of the Province of Quebec against first appellant company to recover $3262.82 for municipal and school taxes for the years 1924–25, 1925–26, 1926–27, assessed upon gas mains laid under public streets in the city. The gas mains were operated by the defendant company, but were owned by the mis-en-cause, the Montreal Light Heat and Power Company, who were added later as defendants and were the second appellants in the present appeal.

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* *Present:* LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The defendants, by separate pleas, contended: (1.) that the valuation and assessment rolls were ultra vires so far as they included the gas mains; (2.) that the first defendants not being proprietors were under no statutory liability for the taxes, and that if the action failed against them it must fail against the mis-en-cause; (3.) that the Superior Court had no jurisdiction as to school taxes.

The trial judge (Loranger J.) gave judgment for the plaintiff city, rejecting each of the above pleas.

Upon appeal in the Court of King's Bench the judgment was affirmed; Letourneau J. dissented in part, being of opinion that the first appellant company was not liable for the municipal taxes, as they were not entered in the rolls and were not proprietors. The appeal is reported at Q. R. 49 K. B. 456.

1931. Dec. 18, 19, 21, 22. *Chipman K.C.* for the appellants. The eight contentions on behalf of the appellants are stated in the judgment of their Lordships (see p. 429). Upon the first four it was argued that the decision of the Supreme Court of Canada in *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (1), and *Bélair* v. *La Ville de Ste. Rose* (2), there followed, were erroneous. Reference was made to the statutory provisions set out in the judgment and to *Sherbrooke Gas and Water Co.* v. *City of Sherbrooke* (3); *Ahern & Soper, Ld.* v. *New York Trust Co.* (4); *Town of Westmount* v. *Montreal Light, Heat and Power Co.* (5); *Cité de Sainte-Cunégonde* v. *Montreal Water and Power Co.* (6);

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(1) [1926] S. C. R. 515.

(2) (1922) 63 Can. S. C. R. 526.

(3) (1891) 15 Legal News (Montreal), 22.

(4) (1909) 42 Can. S. C. R. 267.

(5) (1911) 44 Can. S. C. R. 364.

(6) (1912) Q. R. 41 S. C. 500.

Town of Cookshire v. *Canadian Telephone Co.* (1); *Village of Pierreville* v. *Bell Telephone Co.* (2); *Montreal Light, Heat and Power Co.* v. *Chambly Basin* (3); *Bell Telephone Co.* v. *Cité de Hull* (4); *Breakey* v. *Township of Metgermette* (5); *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry* (6); also, upon the question whether the gas mains were buildings ("bâtiments"), to De Lorimier, Bibliotheque du Code Civile, vol. iii., pp. 248, 267; Laurent, Droit Civil Francais, vol. v., s. 409; Fuzier-Hermann, Code Civil Annoté, s. 519; Pothier, Chose, vol. viii., s. 96; Mignault, Droit Civil Canadien, vol. ii., pp. 400, 401, 407; Dalloz, Jurisprudence Générale, 1887, Pt. 2, p. 221, and 1908, Pt. 1, pp. 329, 330; Carpentier, Répertoire, vol. viii., ss. 95, 96, 133, 134, 135, 381; Colin et Capitant, Cours de Droit Civil, vol. i., s. 600; Audry et Rau, vol. ii., s. 164; Planiol, vol. i., ss. 2207, 2209; it was pointed out there that there was no statutory provision in Quebec corresponding to art. 523 of the Code Napoléon, by which tuyaux are immeubles, and it was argued that the introduction of that article had coloured the views of French jurists as to the meaning of "bâtiment," art. 524 of the Code Napoléon also was referred to; and it was argued further that there are "immoveables" which are not taxable: *Matamajaw Salmon Club* v. *Duchaine*. (7) The fifth and sixth contentions sufficiently appear in the judgment. Upon the seventh contention it was argued: The Code of Civil Procedure expressly provides by art. 54 that the Circuit Court is to have jurisdiction, to the exclusion of the Superior Court, in all suits for school taxes; the statutes which authorize the municipal councils to collect school taxes do not provide that they may be recovered by an action in the Superior Court. There has been great conflict of decisions in Quebec upon this question of jurisdiction.

Their Lordships, after consideration, stated that they were of opinion that the gas mains were "immoveables."

(1) (1913) Q. R. 44 S. C. 126.
(2) (1915) 23 Dom. L. R. 635.
(3) (1915) 24 Dom. L. R. 665.
(4) (1922) Q. R. 61 S. C. 222.
(5) (1920) 61 Can. S. C. R. 237.
(6) [1926] S. C. R. 655.
(7) [1921] 2 A. C. 426.

Beaulieu K.C. for the respondents. Upon the true construction of the Cities and Towns Act the word "land" includes "immoveables": *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (1); *Bélair* v. *La Ville de Ste. Rose.* (2) There was therefore power under s. 534 of that Act to collect the taxes from the tenant, occupier or possessor, as well as from the owner. The Superior Court had jurisdiction as to the school taxes. The statutes authorizing the municipal council to collect them with the municipal taxes by implication gives jurisdiction; that is more particularly so as to the last two years, having regard to the words "at the same time" in s. 16, sub-s. 5, of the Protestant School Act. Further, the Superior Court has general jurisdiction under art. 48 of the Code of Civil Procedure. Art. 54 applies only to personal actions, but this action, being one to enforce the city's privilege, was an action in recognition of a hypothec (see art. 43 (2) (*d*)), and under the Code itself therefore could be brought in the Superior Court: *School Commissioners of Westmount* v. *Galarneau* (3); *Municipalité Scolaire de la Cité de Lachine* v. *Great Northern Western Telegraph Co.* (4) The question being one of local procedure, it is submitted that the view of the two Courts in Quebec should be accepted.

Chipman K.C. in reply referred, on the question of jurisdiction, to: *Commissaires d'Ecoles de St. Joseph de Bordeaux* v. *Gagnon* (5); *Morin* v. *Commissaires d'Ecoles de Ste. Euphemie* (6); *Municipalité Scolaire St. Charles-Bas-du-Sault* v. *Gaunt* (7); *Canada Cement Co.* v. *Town of East Montreal.* (8)

1932. Feb. 23. The judgment of their Lordships was delivered by

LORD TOMLIN. The question under consideration in this appeal is whether the appellants, or either of them, are, or is, liable to the respondent City of Outremont for municipal and school taxes in respect of gas mains lying under the public streets of the city. The mains are the property of the second appellant. The gas undertaking of the second appellant is operated by the first appellant. The soil of the streets under which the mains lie is not owned by the appellants or either of them.

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(1) [1926] S. C. R. 515, 520.
(2) 63 Can. S. C. R. 526.
(3) (1912) Q. R. 44 S. C. 385.
(4) (1919) Q. R. 56 S. C. 215.
(5) (1916) Q. R. 51 S. C. 175.
(6) (1920) Q. R. 60 S. C. 76.
(7) (1921) Q. R. 60 S. C. 360.
(8) [1922] 1 A. C. 249.

The mains were laid and are maintained and the supply of gas is given under a contract dated August 24, 1904, between the respondent and the second appellant, by which the second appellant agreed upon the conditions therein set out to supply gas in the City of Outremont for the term of thirty years.

The gas works of the second appellant at which the gas supplied under the agreement is generated, and with which the mains are connected, have throughout been and are situate in the City of Montreal.

Under the terms of an agreement dated June 7, 1916, the first appellant (then called the Civic Investment and Industrial Company) took over, from August 1, 1916, the operation of the undertaking of the second appellant, and has since continued and still continues to operate such undertaking.

For the years ending respectively October 31, 1925, October 31, 1926, and October 31, 1927, the respondents assessed for municipal taxation purposes the gas mains of the second appellant's undertaking lying under the public streets of the City of Outremont and entered in the valuation rolls the name of the second appellant as proprietor of such mains.

School taxes in respect of the same mains for the year ending June 30, 1925, were included in the collection rolls of the respondent as the result of certain resolutions of the respondent and of the School Commissioners and School Trustees of the City of Outremont, ratified by the Act 11 Geo. 5, c. 114, s. 3, which section was repealed and re-enacted by the Act 16 Geo. 5, c. 74. School taxes in respect of the same mains for the years ending respectively June 30, 1926, and June 30, 1927, imposed by the Act 15 Geo. 5, c. 45, s. 16, as amended by the Act 16 Geo. 5, c. 47, s. 1, were also included in the respondent's collection rolls.

The respondent launched an action in the Superior Court against the first appellant to recover the municipal and school taxes on the gas mains in question for the years 1924–25, 1925–26, 1926–27, with interest.

The second appellant was subsequently added as mis-en-cause. The Superior Court (Loranger J.) maintained the respondent's action for $3262.82 and condemned each of the appellants to pay the said sum with interest at 6 per cent. from December 1, 1926, and declared their immovables situated in the territory of the respondent affected by the respondent's privilege for the payment of the taxes in question, the whole with costs.

The main reasons given by the trial judge for his decision were: (i.) That the gas mains were " immoveable " by nature as being buildings, within the meaning of art. 376 of the Civil Code (following *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (1)), and were situate within the territorial limits of the respondent and were taxable by it; (ii.) That the mis-en-cause was the owner of the gas mains and that the defendant was in possession thereof as owner and was the lessee and in possession thereof and that both were liable for the tax imposed; (iii.) That the Superior Court had jurisdiction in respect of the school taxes on the ground that they were merged with the municipal taxes, the demand affected future rights and was subject to evocation to the Superior Court, and the exclusive jurisdiction of the Circuit Court did not pertain where the claim was made by the municipality.

The appellants appealed to the Court of King's Bench for the Province of Quebec (Appeal Side) and on October 30, 1930, the Court (Tellier, Howard, Letourneau, Hall and Galipeault JJ.) affirmed the trial judge. Letourneau J., however, dissented in respect that he was of opinion that the first appellant was not liable for the municipal taxes

(1) [1926] S. C. R. 515.

because such appellant was not entered on the valuation rolls and because the mains, in his view, were not "land" within the meaning of s. 534 of the Cities and Towns Act permitting the collection of taxes from the tenant, occupant or other possessor of land.

The matter then came before their Lordships' Board at the instance of the appellants, who contended :—

First, that the gas mains were not liable to taxation unless they were "immoveables" within the meaning of the term "immoveable" in s. 521 of the Cities and Towns Act, which confers the taxing power.

Secondly, that the meaning of the word "immoveable" in that section was not to be ascertained by reference to the Quebec Civil Code; and that upon the true construction of the Cities and Towns Act without reference to the Code the word did not cover the gas mains in question.

Thirdly, that even if the word "immoveable" was to be construed by reference to the Quebec Civil Code, gas mains such as these were not immovables within the meaning of the Code.

Fourthly, that even if gas mains under public streets were taxable subject-matter, they were only taxable as immovables by reason of the object to which they were attached, in this case the gas works in Montreal, and that therefore they were not taxable in Outremont.

Fifthly, that the first appellant, not being on the valuation rolls as owner, was not liable and could not be attacked as occupant or possessor, because immovables are not "land" within s. 534 of the Cities and Towns Act.

Sixthly, that the second appellant could not be made liable as mis-en-cause if the first appellant was not liable.

Seventhly, that there was no jurisdiction in the Superior Court to deal with the case so far as the claim was to recover school taxes, exclusive jurisdiction to deal with school taxes residing in the Circuit Court; and

Eighthly, that the form of the judgment was in any case wrong, inasmuch as under it the respondent could recover the sum sued for twice over, once from each appellant.

The first four points are branches of one principal question, whether these gas mains are taxable subject-matter in Outremont, having regard to their nature and to the terms of the statutes conferring the taxing power. These points can therefore be dealt with together.

The power of the respondent to raise municipal taxes depends upon the Cities and Towns Act (R.S.Q., 1925, c. 102).

The provisions of the Act directly relevant to the taxing power are those next set out :—

Sect. 485 corresponds to art. 5696, 1909, R.S.Q., which by the Act 5 Geo. 5, c. 93, s. 72, was replaced for the respondent by the following :—

" 5696. The assessors shall, each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value. In assessing every property, they shall value separately the land, the buildings thereon erected, and the annual value of such property, and enter each valuation in a separate column of the roll.

They shall also enter in the roll the names of all occupants, and the amount of annual rent paid by each of them. The council may, by resolution, relieve the assessors from the duty of making a valuation roll of the taxable property oftener than every three years ; and, in such case, the council shall revise the roll every year, or cause it to be revised by the assessors, as it deems expedient, giving the same notices and delays as for the making of the yearly valuation roll.''

" 488. The actual value of the real estate in the municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessories thereon erected, and all the improvements made thereto."

" 521 (in part). The council may impose and levy, annually, on every immoveable in the municipality, a tax of not more than 2 per cent. of the real value as shown on the valuation roll. . . . ."

There are, however, a number of other sections relating to ancillary matters which are said by the appellants to be relevant as throwing light upon the meaning of the word "immoveable." These sections include the following :—

"502. After every change of owner or occupant of any lot of land set forth in the valuation roll in force, the council, on a written petition for that purpose, and upon sufficient proof, may erase the name of the former owner or occupant, and enter on such roll the name of the new one."

"520.—(1) The following property shall not be subject to taxation :

(a) Lands belonging to His Majesty or held in trust for the service of His Majesty ; (b) The property of the Federal and Provincial Governments and the municipal corporation ; (c) That belonging to *fabriques* or religious, charitable or educational institutions or corporations, or occupied by such *fabriques*, institutions or corporations for the purposes for which they were established and not possessed by them solely for the purpose of deriving a revenue therefrom ; (d) Property possessed and used for public worship, episcopal residences, presbyteries, parsonages and cemeteries, and their dependencies. The presbyteries and parsonages, above mentioned, include any house occupied as a residence by the priest or minister in charge of any church, whether such house be the property of the *fabrique* or of the religious institution or corporation, the owner of the church, or whether it be occupied by the priest or minister as a tenant, provided that only one presbytery, parsonage or residence for each church shall benefit from the exemption granted by this section ; (e) Immoveables used for libraries open to the public free of charge ; (f) All educational establishments which receive no grant from the municipality where they are situate, as well as their dependencies and the lands on which they are erected.

(2) The exemptions mentioned in sub-s. 1 of this section shall not apply to persons occupying, under a title other than that of owner, immoveable property belonging to His Majesty or to the Federal or Provincial Government, who shall be assessed as if they were the actual owners of such

J. C.
1932

MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED v. OUTREMONT CITY.

immoveables, and be liable for the payment of the general and special real estate taxes.

(3) The owners and occupants of the property mentioned in paragraphs (*c*), (*d*), (*e*) and (*f*) of sub-s. 1 of this section shall nevertheless be bound for the cost of the works required for the maintenance of the streets situate opposite such property in the municipalities where such streets are not, wholly or in part, at the charge and expense of the municipality, under the provisions of this Act. Such properties shall nevertheless be taxable for public lighting, for the purchase and maintenance of fire-fighting apparatus, and for the use of water. They shall also be taxable for the opening and maintenance of streets, when such work is wholly or in part at the charge and expense of the municipality, provided that the opening or maintenance work on streets dependent on such property be assumed by the municipality. For the purposes of this sub-s. 3, only the actual value of the lands shall be considered, notwithstanding the provisions of s. 488, to establish the tax to be imposed on the property mentioned in paragraphs (*c*), (*d*), (*e*) and (*f*) of sub-s. 1 of this section."

"530. The cadastral number given to immoveable property upon the official plan and in the book of reference for the territorial division in which such property is situated shall, for taxation purposes, be a sufficient description and identification of such property in the valuation and collection rolls."

"534. Municipal taxes, imposed on any land, may be collected from the tenant, occupant or other possessor of such land as well as from the owner thereof, or from any subsequent acquirer of such land, even where such tenant, occupant, possessor or acquirer is not entered on the valuation roll."

"550. Within fifteen days of the order of the council, the clerk shall give public notice of the day, hour and place where the sale by auction will be held. The notice shall contain a description, according to the provisions of art. 2168 of the Civil Code, of the immoveables the sale whereof is so ordered, and it shall be posted up at the places fixed by the council for publication of municipal notices. If the publication of municipal notices be made in the newspapers in accordance with s. 373, the clerk shall post up the notice of sale in two public places in the municipality."

"555. The purchaser shall thereupon be seized of the immoveable adjudged, and may enter into possession thereof, subject to the same being redeemed within the year following, but shall not remove timber nor the buildings therefrom during the said year.

556. Within the eight days following the adjudication, the clerk shall transmit to the registrar a list of the immoveables so sold for municipal taxes, with the name of the purchaser of each of such immoveables."

Before commenting upon the provisions of the Cities and Towns Act it will be convenient to set out also the relevant provisions of the Quebec Civil Code. Those provisions are as follows :—

"374. All property, incorporeal as well as corporeal, is moveable or immoveable.

375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.

376. Lands and buildings are immoveable by their nature.

377. Windmills and water-mills, built on piles and forming part of the buildings, are also immoveable by their nature when they are constructed for a permanency.

378. Crops uncut and fruits unplucked are also immoveable. According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.

379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there. Thus, within these restrictions, the following and other like objects are immoveable : (1) Presses, boilers, stills, vats and tuns ; (2) All utensils necessary for working forges, paper-mills and other manufactories. Manure,

J. C.
1932

MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED v. OUTREMONT CITY.

and the straw and other substances intended for manure, are likewise immoveable by destination.

380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, embedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached. Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.

381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights or actions which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached.

382. All moveable property, of which the law ordains or authorises the realization, becomes immoveable by determination of law, either absolutely or for certain purposes. . . . .

2168. When a copy of the plans and books of reference for the whole of a registration division has been deposited in the office for such division, and notice has been given by proclamation in the manner mentioned in art. 2169, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any document whatever; and any part of such lot is sufficiently designated by stating that it is a part of such lot and mentioning who is the owner thereof and the properties conterminous thereto; and any piece of land composed of parts of more than one numbered lot is sufficiently designated by stating that it is so composed and mentioning what part of each numbered lot it contains. No description of an immoveable in the notice of application for confirmation of title, or in the notice of a sale by the sheriff or by forced licitation, or of any sale having the effect of a sheriff's sale, or in the sheriff's deed, or in the judgment of confirmation, will be deemed sufficient unless it is made in conformity with the provisions of this article. As soon as such plans and books of reference have been deposited and notice thereof has been given, notaries passing acts concerning immoveables indicated on such plan are bound to designate such immoveables by the number given to them upon such plan and in the book of reference, in the manner above prescribed; in default of such designation the registration does not affect the lot in question, unless there is filed a requisition or notice indicating the number on the plan and book of reference as being that of the lot intended to be affected by such registration."

Having regard to the terms of the Education Act (R. S. Q., 1925, c. 133) and the Protestant School Act (15 Geo. 5, c. 45), the taxable subject matters in respect of school taxes are admittedly to be determined by the same considerations as the taxable subjects in respect of municipal taxes, inasmuch as the school taxes under the Education Act are exigible upon "all taxable property in the school municipality," and those under the Protestant School Act are exigible upon "all immoveable property" in the municipality inscribed in the neutral panel.

It is to be observed that in regard to the question now being considered the appellants' case involves an impeachment of the conclusions reached by the Supreme Court of Canada in *Montreal Light, Heat and Power Consolidated* v. *City of Westmount.* (1) In that case gas mains and electric poles and wires were held to be taxable in the municipality in which they were situate.

Their Lordships, after full consideration, are of opinion that the reasoning of the majority of the Court contained in the judgment in the last-mentioned case delivered by Anglin C.J. is well founded.

The word "immoveable" in s. 521 of the Cities and Towns Act must, in their Lordships' view of the construction of that Act, bear the meaning given to it by the Quebec Civil Code. It is true that there is in the Cities and Towns Act a lack of precision in the use of terms which renders the task of construction unnecessarily difficult, but there is nothing

(1) [1926] S. C. R. 515.

in that Act to restrict the meaning attributed to the word "immoveable" by the Civil Code. The words "land" and "lands" are in the Cities and Towns Act used in a sense wide enough to cover "immoveables" (see and compare sub-s. 1 (*a*) of s. 520, and sub-s. 2 of the same section), but this use of "land" and "lands" does not restrict the meaning of "immoveables." Nor does the reference in s. 530 to the cadastral number given to immovable property have the effect of excluding from "immoveables," those which have not or cannot have any cadastral number. Sect. 530 only renders a reference to the cadastral number, where there is one, a sufficient description of the immovable.

What then is an "immoveable" under the Civil Code? A gas main laid in the earth is an "immoveable" in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were movable before they came to form part of the construction.

Of the four means specified in art. 375 of the Civil Code by reason of which property is to be treated as "immoveable," three can certainly be excluded. The gas mains are not "immoveable by destination," because the soil in which they are placed does not belong to the appellants. They are not "immoveable" by reason of the object to which they are attached. Into that category fall only things in themselves movable which are permanently attached to an immovable. The gas mains were never movables, though constructed out of things which were movables. It is not suggested that the gas mains are immovable by determination of law. There, therefore, remains only the category of immovables by their nature. These are in s. 376 defined in the words, "lands and buildings are immoveable by their nature."

It is said that gas mains are not buildings ("bâtiments") within the meaning of that term as used in art. 376, and an argument based upon art. 523 of the Code Napoléon, which makes "tuyaux" immovables, was addressed to their Lordships in support of that view. Their Lordships are of opinion that the term buildings ("bâtiments") covers constructions such as these gas mains, and that these mains must be regarded as immovable by their nature in the territory in which they are physically situate, and are therefore taxable subjects in the City of Outremont.

With regard to the fifth point, it has already been indicated that the term "land" in the Cities and Towns Act includes "immoveables," and this being so, their Lordships think that the first appellant is liable for the taxes under s. 534 of the Act as occupant or possessor of the mains. In these circumstances the sixth point does not arise, and the second appellant is liable as owner whose name is on the rolls.

The seventh point raises a matter of jurisdiction. Could the school taxes be recovered in the Superior Court?

Article 48 of the Code of Civil Procedure provides that the Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada.

Article 54 of the same Code is, so far as material, as follows:—

"54. The Circuit Court has ultimate jurisdiction, to the exclusion of the Superior Court . . . . (2.) In all suits for school-taxes or school-fees, and all suits concerning assessments for the building and repairing of churches, parsonages and churchyards, whatever may be the amount of such suits."

The school taxes for the first year of assessment—namely, 1924–25, of the three years under consideration were exigible under the provisions of the Education Act.

That Act empowered the school commissioners and trustees to cause to be levied by taxation the taxes necessary for the support of the schools under their control.

Sect. 398 of the Act was as follows: "The local council of any city, town, village, or rural municipality, when required by the school board of a school municipality situate wholly or partly in its territory, shall collect the taxes of such school municipality at the same time as its own."

The Cities and Towns Act contained the following provisions with regard to the collection of school taxes:—

"537. The council shall, on the requisition of the school commissioners or trustees of any school municipality situated within the municipality, accept the school assessment roll or the certified extract therefrom presented by them, and order the treasurer to collect such taxes, in the same manner and at the same time as municipal taxes."

"539. If the municipal council has ordered, by resolution, that the collection of school taxes be made at the same time and in the same manner as municipal taxes, the treasurer shall enter in the general collection roll the amount of such taxes, collect them and remit them forthwith to the secretary-treasurer of schools. In such case actions to recover taxes shall be taken by the municipal corporation."

In the year 1919 certain resolutions were passed by the School Commissioners and School Trustees of Outremont and by the City Council of the City of Outremont providing for the collection by the city of the school taxes.

These resolutions were confirmed by 11 Geo. 5, c. 114 (repealed and re-enacted by 16 Geo. 5, c. 74), whereby the following articles were added for the respondent to the provisions of the Cities and Towns Act:—

"5748a. The city may, under agreement with the school commissioners or trustees of any school municipality situated within the municipality, upon resolution to that effect passed by said school commissioners or trustees, as the case may be, and by the city council, acquire the school assessment roll or a certified extract therefrom presented by said school commissioners or trustees, and pay the said school commissioners or trustees the amount mentioned on such school assessment roll or certified extract therefrom, less the amount of a commission of not more than 1 per cent., at the dates and in the manner agreed upon.

5748b. The resolution passed by the school commissioners of the municipality of the City of Outremont, in the county of Westmount, on March 10, 1919, the resolution passed by the school trustees for the municipality of the City of Outremont, in the county of Westmount, on March 11, 1919, and the resolution passed by the city council of the City of Outremont on April 2, 1929, are hereby declared legal and valid for all intents and purposes."

"5755. The payment of municipal taxes and of school taxes, in cases provided for in arts. 5748, 5748a and 5748b, may be also claimed by an action brought in the name of the corporation before the Magistrate's Court, or the Circuit Court for the county or district, or before the mayor, or two or more councillors acting ex-officio as justices of the peace, or before the recorder's court if there be one."

The Courts in Canada have taken the view that under the statutory provisions referred to above the municipality could recover the school taxes in the Superior Court. On such a matter of domestic procedure their Lordships' Board would be reluctant to differ from the conclusions reached by the Courts in Canada, unless such conclusions were clearly shown to be wrong. Their Lordships are, however, satisfied that upon the true construction of these provisions the municipality are empowered to sue for the school taxes in the Superior Court. The words "in the same manner and at the same time" in s. 537 of the Cities and Towns Act, read with the words "may be also claimed" in art. 5755, introduced by 11 Geo. 5, c. 114, render it clear, in their Lordships' view, that the municipality were empowered to recover school taxes in the Superior Court, and that to that extent the provisions of art. 54 of the Code of Civil Procedure were repealed. This point of the appellants, therefore, fails so far as the school taxes for the year 1924–25 are concerned.

The school taxes for the years 1925–26 and 1926–27 were exigible under the Protestant School Act, which provides as follows:—

"16.—(2) From and after July 1, 1925, in the various cities, towns or other local municipalities mentioned in paragraph 1 of this section, there is hereby imposed a uniform tax [to be entitled the Protestant school tax (see sub-s. 1)], at the rate of 12 mills in the dollar, upon all the immoveable property inscribed in the neutral panel of each such city, town or local municipality. . . . .

(5.) The taxes above mentioned shall be levied and collected by the proper municipal authorities, at the same time as the municipal taxes, and, notwithstanding any special or general provision of law governing any such municipality, the amount of the said Protestant school tax so levied and the share of the said tax upon the neutral panel accruing for the benefit of Protestant education, shall be paid over to the Central Board by the proper municipal authorities. . . . ."

Their Lordships are of opinion that upon the true construction of these provisions the municipality had the same powers for recovering the taxes under this Act as they had for recovering the municipal taxes, including a power to sue for them in the Superior Court, and that to that extent the provisions of art. 54 of the Code of Civil Procedure were repealed. In regard, therefore, to the school taxes for the two last-mentioned years the conclusion must be the same as with regard to the school taxes for the first of the three years in question.

With regard to the eighth point, their Lordships having heard and taken note of the statement of the respondents' counsel that the respondents did not desire to treat, and could not treat, the order which has been made as entitling them to recover more than the one sum of $3262.82 and interest on the footing of the joint and several liability of the appellants, their Lordships do not think it necessary to take the point into consideration.

In the result, therefore, in their Lordships' judgment the appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1932
March 8.

THE KING . . . . APPELLANT;

AND

B. C. FIR AND CEDAR LUMBER COMPANY, LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Income Tax—Income from Business—Receipt under Insurance of Loss of Profits due to Fire—Taxation Act (R. S. B. C., 1924, *c.* 254), *s.* 2.

Money received by manufacturers under fire policies insuring them in respect of loss of net profits that would have accrued had there been no interruption of business caused by fire is income from a business within the meaning of s. 2 of the (British Columbia) Taxation Act (R. S. B. C., 1924, c. 254), and accordingly is to be brought into account in computing the net income chargeable to tax under that Act.

J. Gliksten & Son, Ld. v. *Green* [1929] A. C. 381 followed.

Judgment of the Supreme Court of Canada [1931] S. C. R. 435 reversed.

APPEAL (No. 77 of 1931) by special leave from a judgment of the Supreme Court of Canada (May 13, 1931) reversing a judgment of the Court of Appeal of British Columbia (October 7, 1930), which affirmed a judgment of W. A. Macdonald J.

The respondent company carried on business in British Columbia as merchants and manufacturers of lumber. Their premises and plant having been destroyed by fire they recovered sums under policies insuring them against the loss of net profits that would have accrued had there been no interruption of their business caused by fire.

The question for determination was whether in computing the net income for the purposes of the British Columbia Taxation Act (R. S. B. C., 1924, c. 254) the sums so received had to be brought into account.

The facts and the material provisions of the Act appear from the judgment of the Judicial Committee.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD MERRIVALE, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

The Supreme Court of Canada (Anglin C.J. and Newcombe, Lamont, Smith and Cannon JJ.), reversing the decision of the Court of Appeal of British Columbia (Martin J.A. dissenting), held that the receipts in question were not chargeable to tax. The proceedings in the Supreme Court are reported at [1931] S. C. R. 435.

1931. Dec. 3, 4. *Hon. Geoffrey Lawrence K.C.* and *Wilfrid Barton* for the appellant.

Tilley K.C. and *J. W. S. Armstrong* for the respondents.

[Reference was made to *B. C. Fir & Cedar Lumber Co.* v. *Minister of National Revenue* (1); *J. Gliksten & Son, Ld.* v. *Green* (2); *Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (3); *Short Brothers, Ld.* v. *Commissioners of Inland Revenue* (4); *Arthur Guinness, Son & Co.* v. *Commissioners of Inland Revenue* (5), disapproved in *Commissioners of Inland Revenue* v. *Newcastle Breweries* (6); *Alliance & Dublin Consumers' Gas Co.* v. *M'Williams* (7), and (as to the definition clause) to *Dilworth* v. *Commissioner of Stamps.* (8)]

1932. March 8. The judgment of their Lordships was delivered by

Lord Blanesburgh. This is an appeal by special leave from a judgment of the Supreme Court of Canada of May 13, 1931, whereby, in effect, judgment in favour of the plaintiff-appellant, pronounced at the trial by the Supreme Court of British Columbia and affirmed on October 7, 1930, by the Court of Appeal of the same Province, was discharged. The appellant now seeks to have these two earlier judgments restored.

The broad question for decision is whether certain moneys received by the respondents under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under

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(1) [1930] Can. Ex. R. 59.
(2) [1929] A. C. 381.
(3) (1922) 12 Tax Cas. 427.
(4) (1927) 12 Tax Cas. 955.
(5) [1923] 2 Ir. R. 186.
(6) (1927) 12 Tax Cas. 927.
(7) [1928] I. R. 1.
(8) [1899] A. C. 99, 106.

J. C.
1932
REX
v.
B. C. FIR
AND CEDAR
LUMBER CO.

the British Columbia Taxation Act, 1924, to be brought into account by them for assessment to income tax.

This question has led, in these proceedings, to an acute difference of judicial opinion. The learned judges of the Supreme Court unanimously favoured a negative answer to the question, and their view had the support of Martin J.A. in the Court of Appeal of the Province. On the other hand, the four remaining learned judges of that Court, supporting the learned trial judge, were all in favour of the view that the moneys in question must be brought into account by the respondents for taxation purposes.

The respondents are a company incorporated under the Companies Act of British Columbia. Since 1921 they have been carrying on business at the city of Vancouver as manufacturers of and dealers in lumber and lumber products. On August 21, 1923, their plant and premises were destroyed in a conflagration. These subjects were insured against loss and damage by fire under annual policies, taken out or renewed in the previous March with some seventeen insurance companies. The respondents were also insured by the same companies against the further loss or damage they might sustain in the event of their plant either in whole or in part and for a period long or short being shut down or its working suspended in consequence of fire. These policies, the use and occupancy insurances already referred to, were separate from but complementary to the main policies. They insured the respondents in the total sum of $84,000 in respect of loss of "fixed charges" and $60,000 in respect of loss on "net profits." The nature of the liability so assumed by the insuring companies, with the character and quality of the payments made to the respondents in its discharge, is made sufficiently apparent by the definitions of the expressions, "fixed charges" and "net profits," contained in the policies themselves. "Fixed charges" are there defined to mean: "All the standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the said plant shall be inoperative." "Net profits" are defined to mean "the net profits that would have accrued

J. C.
1932
Rex
v.
B. C. Fir
and Cedar
Lumber Co.

had there been no interruption of business caused by fire."

The annual premium upon the use and occupancy insurances amounted to $3828.29. This premium had, in ordinary course, been brought into the accounts of the respondents as a revenue charge, and it is stated to have been allowed by the taxation authorities as a permissible deduction in the computation of the net income of the respondents for the purpose of income tax under the Taxation Act. This payment of premium out of revenue and its allowance as a disbursement are circumstances of importance in the case.

The loss payable under the main fire policies was, it would appear, separately adjusted with the companies, was duly received by the respondents, and as to that receipt, admittedly a receipt on capital account, no question is raised. As to the claims of the respondents under the use and occupancy policies, the respondents and the adjuster of the insuring companies agreed that the period of interruption of the respondents' business was 215 business days, this being the length of time estimated to be required for the rebuilding of the plant, and the loss was adjusted on the following basis :—

Loss of net profits, estimated for $317.23 per day, and allowed at $200 per day . .	$43,000
Payment of fixed charges, estimated and allowed at $234.80 per day . . .	$52,427.90
Total . . .	$95,427.90

It is not disputed that as between the tax years 1923 and 1924 this sum if assessable to tax at all is properly apportionable as follows :—

1923—113 business days :	
Net profits	$22,600.00
Fixed charges	$27,555.05
1924—102 business days :	
Net profits	$20,400.00
Fixed charges	$24,872.85

The sum of $95,427.90 having been duly received, the respondents in their income tax returns to the Province for the year 1923 included the sum of $41,293.20 as an income receipt, and in their return for the year 1924 they included as a similar receipt the sum of $33,706.80. In the result, Provincial income tax for the years 1923 and 1924 was in fact paid in respect of these sums aggregating $75,000 out of the total sum of $95,427.90 received as already stated.

The respondents did not bring into account for either year the balance—$20,427.90. Their view even then was that that sum was exempt from liability to tax for the reason that it represented moneys received from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having in fact taken a less number of days than that estimated for and allowed by the adjusters.

Now, with reference to these matters two things can at once be said. On the one hand, the $75,000 were brought in before any advice was taken, and it is agreed between the parties that the mere fact that income tax was inadvertently paid by the respondents thereon is not to prejudice them to the extent to which in these proceedings it is not established that these moneys were liable to be brought into charge. On the other hand, it has not been contended by the respondents that any distinction in the matter of liability to tax can really be drawn between the $75,000 in respect of which its existence was originally assumed by them and the balance of $20,427.90 in respect of which exemption was always claimed.

On November 28, 1927, the action out of which this appeal arises was commenced. There was a claim for arrears of personal property tax for interest and for penalties. But it soon emerged that there was no dispute between the parties with reference to the personal property tax. The claim which remained—not, it must be agreed, very clearly alleged—was originally, in effect, one for income tax, upon the balance figure of $20,427.90, already mentioned. At the trial, however, as a result of preliminary admissions of fact between the parties, it was found that, for special reasons which for the moment their Lordships pass by, the accountability of the respondents to income tax in respect of the receipts

J. C.
1932
Rex
v.
B. C. Fir and Cedar Lumber Co.

representing fixed charges need not be further disputed, and that the real question, effective in result, was confined to the alleged liability of the respondents for income tax in respect of "the loss of net profits" receipt, and it was agreed that, if it were held that the respondents were liable to income tax on that receipt, the sum remaining recoverable in the action, after all adjustments, was $3,922.86, any question of liability to penalties being held over. Thus it was that the learned trial judge who held the respondents to be so accountable entered judgment for the Crown in the sum stated. Thus also it was that in all the Courts attention has been focussed on this one major issue, and it is with reference thereto alone that the judgments under review have been given.

The question whether this "loss of net profits" receipt is one which must be brought into calculation for the purpose of arriving in each of the tax years in question at the sum for which the respondents are assessable to Provincial income tax must depend upon the provisions, properly construed, of the taxing statute of the Province. But it will be convenient before these provisions are applied to that receipt to ascertain apart from any question as to income tax its precise place and character in the economy of the respondents' business. And there is, it would appear, little difficulty in ascertaining this.

The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might definitely be brought to a close and acquisition of gain for them definitely ended. But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of reinstatement.

This insurance receipt therefore was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount.

Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and therefore out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would but for the stoppage presumably have been earned.

Finally, the receipt was one of which, as their Lordships think, it can be fairly said that it arose from the business of the respondents. The two English cases of *Commissioners of Inland Revenue* v. *Newcastle Breweries* (1) and *J. Gliksten & Son, Ld.* v. *Green* (2) are authorities for this proposition. This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves a net receipt involving gain—an unusual mode of deriving gain from the business, it may be agreed, but, as Lord Warrington said in similar circumstances in the *Newcastle Breweries* case (1), not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by Sargant L.J. in *Gliksten's* case (2), it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialized.

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(1) 12 Tax Cas. 927.

(2) [1928] 2 K. B. 193; [1929] A. C. 381.

This then as applied to the respondents' business is the nature of the receipt with reference to which the inquiry must now be made whether, under the Taxation Act, 1924, it is of a character to be brought into charge.

That Act is very lengthy, it consists of 200 sections, but its provisions relevant to the inquiry in hand are not numerous. Sect. 2 is an interpretation section. It places a meaning upon 28 expressions used in the statute. In 13 instances the definitions which follow are said to be "included" in the term defined; in 15 instances the term defined is said to "mean" that which follows.

The word "income" is in the former class, and their Lordships cannot doubt that in consequence the word, as used in the statute, includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import: see *Dilworth* v. *Commissioner of Stamps.* (3)

By s. 2, unless the context otherwise requires, "income," amongst many other things, "includes" the gross amount "earned, derived, accrued or received from any source whatsoever, the product of capital, labour, industry or skill . . . . and includes all income, revenue, rent, interest or profits, arising, received, gained, acquired, or accrued due from . . . . real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever." "Person" includes corporations.

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(1) 12 Tax Cas. 927, 947.

(2) [1928] 2 K. B. 193, 203.

(3) [1899] A. C. 99, 106.

By s. 4, sub-s. 1, it is provided that: "To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes: (*a*) All property within the Province, and all output and income of every person resident in the Province, ... shall be liable to taxation."

Part III. of the Act relates to taxation of income, and certain classes of income are made exempt from taxation by s. 42.

Sect. 44, sub-s. 1, is as follows: "The net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exemptions provided in s. 42, and all income tax payable to the Crown in the right of the Dominion, and all expenses incurred in the production of that part of his income which is liable to taxation; . . . . the following shall not in any case be allowed as expenses incurred in the production of income:—. . . . (*e*) Any loss or expense recoverable under any insurance policy or contract of indemnity."

By s. 48. "(1.) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand, and filed with the Assessor of the assessment district in which the income is liable to taxation. . . . . (3.) Where the return contains a statement of income derived from any business, the taxpayer shall attach thereto a copy of his certified balance-sheet and profit and loss account relating to that business for the period covered by the return."

By s. 51. "The tax on income shall be assessed, levied, and paid annually upon the net income of the taxpayer during the last preceding calendar year."

A reference to s. 44, sub-s. 1 (i), and s. 48, sub-s. 3, shows very clearly why in this case the receipt by the respondents in respect of "fixed charges" disappeared from the discussion. In their accounts for the purpose of arriving at their "net income" the respondents were entitled to the benefit of a deduction for fixed charges as an expense; they were, however, required by s. 44, sub-s. 1 (i), as against these lost fixed charges to bring in the fixed charges insurance receipt. The effect (the account being otherwise in credit) was necessarily to increase by the amount of that receipt the ultimate net income of the respondents.

Leaving therefore that item, the question is whether within the meaning of the Act the insurance receipt in respect of "loss of net profits" was also "income" to be brought into account so as to enter into the calculations for determining the "net income" of the business for income-tax purposes.

In view of the nature and origin of the receipt, as they have traced these, their Lordships have reached the conclusion that within the meaning even of the interpretation clause this receipt was "income from a business," and that in ordinary parlance it was income or gain derived from the business of the respondents which had necessarily to be brought into receipt as such in the profit and loss account of the business referred to in s. 48, sub-s. 3, of the statute.

In effect, this was the view taken by the learned trial judge and by the majority of the Court of Appeal of British Columbia. The dissenting view of Martin J.A., although perhaps less clearly expressed, may be taken to coincide with that of the learned judges of the Supreme Court, which was that the statute nowhere provides for taxation of moneys paid by way of indemnity for profits not earned but irretrievably lost: that the moneys in question represented insurances placed by the respondents in order to meet the possibility of destruction by fire of its means of earning profits: that that event occurred, with the result that the respondents made no profit out of the property which could be taxed for the period in question: that there were therefore no profits to tax, and, in the absence of clear language authorizing such a course, there was no warrant for taxing

J. C.
1932

REX
v.
B. C. FIR
AND CEDAR
LUMBER CO.

money substituted for profits by way of indemnity for their loss.

Their Lordships feel that the true question at issue has not in this statement been really dealt with by the learned judges of the Supreme Court. The real question was whether the insurance moneys in question constituted "income" of the respondents within the meaning of the Taxation Act, and not whether these moneys were "profits" of its business. Moneys which are not strictly "profits" of a business may yet be income of the taxpayer. But even on the question whether the moneys here could properly be described as "profits" the learned judges do not seem to have referred to the reasoning of the House of Lords in *Gliksten's* case (1), which would appear to be in conflict with their own.

But, however the receipt be described, it is because it is truly "income" of the respondents that it must be brought into charge in their revenue account for the purpose of arriving in respect of the year of charge at the respondents' net income. Whether the whole or any part of it is finally chargeable depends upon the result of the whole annual expenditure and revenue accounts of which it constitutes one item only.

For these reasons their Lordships find themselves in the result in agreement with the learned trial judge. They are unable to concur in the conclusion of the Supreme Court. They think accordingly that this appeal should be allowed, and the judgment of the Court of Appeal of British Columbia restored. This will automatically revive the judgment of the learned trial judge.

And their Lordships will humbly advise His Majesty accordingly.

The Crown must have its costs before the Supreme Court, but in view of the observations of their Lordships upon this subject made on the application for special leave there will be no costs of this appeal.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for respondents: *White & Leonard.*

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(1) [1929] A. C. 381.

[HOUSE OF LORDS.]

H. L. (E.)* 1932 April 28.

BANCO DE PORTUGAL . . . . . APPELLANTS;

AND

WATERLOW AND SONS, LIMITED . . RESPONDENTS.

WATERLOW AND SONS, LIMITED . . APPELLANTS;

AND

BANCO DE PORTUGAL . . . . . RESPONDENTS.

Breach of Contract—Measure of Damages—Contract to print Bank Notes—Bank of Issue—Delivery to unauthorized Person—Spurious Notes put into Circulation—Withdrawal of Issue and Exchange of Notes of that issue, good or bad, for other Notes of Bank—Loss on Exchange of Notes of an inconvertible Currency.

A firm of printers employed by the Bank of Portugal to print a series of bank notes known as Vasco da Gama 500 escudo notes delivered to the Bank 600,000 notes which were put into circulation in Portugal. Subsequently, in breach of their contract of employment, the printers delivered to one M., the head of a band of criminals, 580,000 notes of the same type, printed from the original plates or from plates made from the same die, in the belief that he had the authority of the Bank. M. and his associates introduced these false notes into Portugal and put a large number of them into circulation. The Bank on discovering that unauthorized notes were in circulation issued notices withdrawing the whole of this issue of Vasco da Gama notes and undertaking, within a limited time, to exchange all notes of this type presented to the Bank for other notes. The Bank had an exclusive licence to issue bank notes as legal tender in Portugal, but the amount of the notes to be issued was controlled by law. At all material times the currency was inconvertible.

In an action by the Bank against the printers for breach of contract the defendants maintained (1.) that the loss suffered by the Bank was due to their own voluntary action in paying the unauthorized notes; (2.) that the loss to the Bank was limited to the cost of printing and paper in regard to the new issue:—

Held, (1.) that the loss arose naturally from the breach of contract; (2.) by Viscount Sankey L.C., Lord Atkin, and Lord Macmillan (Lord Warrington of Clyffe and Lord Russell of Killowen dissenting), that the proper measure of damages was the exchange value expressed in sterling of the genuine currency given in exchange for the spurious notes together with the cost of printing the genuine notes withdrawn.

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* *Present:* VISCOUNT SANKEY L.C., LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

H. L. (E.)
1932
Banco de Portugal v. Waterlow & Sons, Ld.
Waterlow & Sons, Ld. v. Banco de Portugal.

Both these appeals related to the measure of damages. The facts are fully stated in the opinion of the Lord Chancellor. The following statement is merely to explain the nature of the judgments.

In the action the Banco de Portugal, of 148 Rua de Commercio, Lisbon, bankers to the Portuguese Government, claimed damages for alleged breach of contract, negligence, or conversion from Waterlow & Sons, Ld., printers, of Great Winchester Street, E.C.

The Banco de Portugal said that in 1922 they entered into certain contracts with Messrs. Waterlow & Sons for the printing and supply of Portuguese bank notes. They alleged that one of the terms of those contracts was that Messrs. Waterlow & Sons should take all necessary precautions to prevent forgery of the notes and that they should not print notes from the same plates except on the express authority of the Bank and for delivery to the Bank. The Bank alleged that, in breach of the contract, or negligently and in breach of duty, Messrs. Waterlow & Sons in 1925 printed a quantity of 500 escudos [about *5l.*] bank notes of the issue bearing a portrait of Vasco da Gama, the circumnavigator, from the plates made to the Bank's specification and delivered them to an unauthorized person, a Dutchman named Marang, whose associates formed the Banco de Angola e Metropole in Portugal to enable the notes to be put into circulation. The Bank alleged that they were forced to withdraw the issue from circulation and to honour all notes which were presented, thus suffering considerable loss.

Messrs. Waterlow & Sons denied that they had been guilty of any breach of contract, breach of duty, or negligence. They further said that, if the Bank had suffered any damage, that damage was caused, or contributed to, by the Bank's own negligence.

Wright J. held that it was an implied term of the contract that there was to be no use of the plates for any purpose not authorized by the plaintiffs, and that there was an absolute duty on the defendants not to print or deliver notes of the plaintiff Bank without the authority of the Bank, and, even if the defendants were bound only to take reasonable care to avoid such acts, the defendants had, on the facts, fallen short of the standard of care required by the special nature of the business, and the plaintiffs were entitled to recover. His Lordship entered judgment for 569,421*l.*, with costs, in favour of the Banco de Portugal.

Messrs. Waterlow & Sons appealed on the ground that the damages were excessive, and the Bank cross-appealed in respect of a deduction of 80,000*l.* which Wright J. had made from the amount of damages claimed by them in respect of spurious notes cashed by the Bank after they had the means of discriminating the true from the false.

Greer and Slesser L.JJ. held that the damages should be reduced to 300,000*l.*, on the ground that, if the Bank had acted reasonably, they would have obtained from Messrs. Waterlow means of distinguishing good notes from bad within five days of the discovery of the fraud. The Bank, however, were entitled to those damages based on the exchange value of good notes which they had issued in place of bad.

Scrutton L.J. thought that the Bank were not entitled to damages on the basis of the face value of the genuine notes issued by them in exchange for Marang notes, but only to 8922*l.*, the cost of printing notes to replace the genuine notes with which they had parted. If, on the other hand, he was wrong in this, he thought that the Bank were entitled to the full amount of their claim.

On the present appeals Messrs. Waterlow maintained that the only loss suffered by the Bank was the loss of printing and paper. The Bank maintained that judgment ought to be entered for them for 610,392*l.* or, alternatively, for 569,421*l.*, the amount awarded by Wright J.

By arrangement between the parties Messrs. Waterlow's appeal was heard first.

1932. Feb. 2, 4, 5, 8, 9, 11, 12, 15, 16. *Gavin Simonds K.C.* (with him *Norman Birkett K.C.*, *James Wylie* and *Bensley Wells*) for Waterlow & Sons, Ld. The Bank claim that they have issued notes of a certain face value and have received nothing in exchange but the false Marang notes, bits of paper which are worth nothing, and that therefore the damage they have suffered is the face value of the notes so issued. Messrs. Waterlow dispute that. It is for the Bank to prove affirmatively that they have suffered any greater loss than the cost of obtaining the notes and the cost involved in the increased obligation which the greater number of notes circulated imposes upon them, and in the submission of Messrs. Waterlow that they have failed to do. Apart from that question, is it in the usual course of things for a bank to pay forged notes, knowing them to be forged, as well as true? Is it in the usual course or something to be expected by the printer of the notes that the bank of issue will not take every possible step to ascertain how the false may be distinguished from the true, and having ascertained that fact will not refuse to honour the false? See *Hadley* v. *Baxendale.* (1) It was upon a consideration of those questions that the difference in the amounts awarded by Wright J. and by the Court of Appeal is accounted for. No doubt the Bank decided to pay all alike without distinguishing between the true and the false for the sake of their credit and for the benefit of the State, but they were not entitled to put upon the printers the damage so ensuing. The claim of the Bank rests upon this, that in order to remedy the ill resulting from the circulation of the Marang notes they were compelled to issue their own notes in exchange. On this assumption what damage have they suffered? On behalf of the Bank it was contended that the Bank's notes, being the currency of the country, had the same value in their hands as in those of third parties, and that contention formed the basis of the judgments in the Courts below. But the position of the third party and of a bank of issue is wholly different. If the liability of the bank is to pay in gold their liability would be measured by so much gold, but if the notes are only to be honoured in paper, the value of the paper is their only liability; and it has been found by the Courts below that there was no probability of a return to gold. These notes do not in form contain any promise to pay, but, assuming a promise to pay to be implied, it is impossible to say that a wad of promissory notes in the possession of the bank is of the same value as if the notes were in the possession of the third party. A bank note in the hands of the bank of issue is just a piece of stationery of paper worth. One test is to see how the notes are to be replaced. The third party would have to pay the face value either in currency or services. The bank could replace the notes from their stock at the cost of the printers' bill. If the notes were burnt while in the hands of the bank, they would lose nothing; but the third party could not replace the notes except at the cost of the face value. Apart from any question of a limitation on their power of issue, the bank of issue would only lose the value of the paper. If the Bank had had to contract their currency in order to meet their liability a different question would have arisen, but the Bank have never put their claim upon any diminished power of issue. It follows that the Bank have not proved any damage beyond the paper value of the notes.

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(1) (1854) 9 Ex. 341.

On the other part of the case—namely, as to the date at which the liability of Messrs. Waterlow should cease. If the Bank intended to make the printers liable for the payment of the false notes, as the result of their breach of contract in delivering notes without the authority of the Bank, they ought to have given notice of their intention to the printers, because that liability was not a normal consequence of their breach of contract. But assuming the printers to be under some liability in that respect, their liability should be limited to the earliest period at which the Bank could reasonably have discovered which notes were true and which false.

Stuart Bevan K.C. and *Le Quesne K.C.* (with them *Somervell K.C.* and *Hon. H. L. Parker*) for the Bank of Portugal. On the question whether the Bank ought to have taken steps to limit their loss all the judges agreed that the Bank were bound to give notice withdrawing this issue of Vasco da Gama notes from circulation. If the notice had stated that the Bank intended to pay all notes only so long as they were unable to discriminate between good and bad notes the immediate run on the Bank would have been much more severe and the damage, instead of being mitigated, would have been aggravated. If, on the other hand, the Bank had subsequently distinguished between good and bad notes without giving any notice to the public they would have been open to the grave charge of having misled the public by leading them to believe that all notes would be paid without discrimination. At no time, with or without knowledge, were the Bank not justified in paying the unauthorized notes, and they therefore claim the market value of the genuine notes given in exchange for the false notes until December 26, 1925, the day on which the Bank announced that the exchange would cease. As to the argument founded on inconvertibility, if that contention was right as to the position of the Bank of Portugal, the Bank of England to-day were in the same position. It is rather a startling proposition that if the Bank of England were deprived by theft or otherwise of certain notes in circulation the Bank would be only entitled to the cost of paper and printing. Face value had been spoken of, but the true measure of damage was the market value of the genuine notes, and at all material times the market value of a note was approximately *5l.* If in the ordinary way the Bank had handed out 200,000 notes they would have received assets of a corresponding value, whereas here they had received nothing except worthless pieces of paper. The general rule with regard to damages was stated by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (1) as follows: "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." Applying that principle, the Bank were entitled to the market value of the genuine notes with which they had parted for no consideration. Whether the notes were convertible or inconvertible, they had a market value, and the market value of the thing of which the Bank has been deprived is the true measure of damage. By the issue of those notes the Bank were without the sterling value of the notes. In the normal course the Bank always issued notes for assets; here they had issued notes for no assets. The Bank were under the same liability with regard to those notes as if they had parted with them for assets, and that liability was valued all over the world at *5l.* No liability was incurred on notes until they were put into circulation; but as soon as they were issued a liability was incurred, and for that liability the Bank got nothing in exchange. The Bank claim for the 209,000 notes what they would have received if they had issued them in the ordinary way, but here they have issued notes for which they have received nothing. The Bank had been compelled to incur a liability, and the question is what was the value of the liability which they had incurred. As a consequence of what happened the Bank stood short in its assets. That lack is in no way affected by the fact that it was competent to the Bank to issue a corresponding number of notes out of its reserve. The liability which the Bank had incurred was to accept each of the Marang notes as of the value of *5l.*, whereas the notes were worth nothing: and an equivalent number of genuine notes had to be handed over to the customer. The loss which the Bank has sustained was by delivering these notes. The notes passing from the Bank by delivery have just the same value as the notes in the hands of a third party. As long as the notes were in the cellars of the Bank they had a potential value only; they acquired an actual value by being issued. Convertibility or inconvertibility simply went to market value. For all other purposes it could be disregarded. On that point the opinion of the majority of the Court of Appeal was right.

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(1) (1880) 5 App. Cas. 25, 39.

Gavin Simonds K.C. replied.

The House took time for consideration.

1932. April 28. VISCOUNT SANKEY L.C. These are the appeals of the Banco de Portugal (hereinafter called "the Bank"), and of Waterlow & Sons, Ld. (hereinafter called "Messrs. Waterlow"), from an order of the Court of Appeal dated March 26, 1931, varying the judgment and order of Wright J. dated January 12, 1931. The learned judge directed judgment to be entered for the Bank for 569,421*l.* with costs. The Court of Appeal, by a majority consisting of Greer and Slesser L.JJ., directed that judgment should be entered for the Bank for the reduced sum of 300,000*l.*, Scrutton L.J. dissenting from that judgment, for in his view the Bank of Portugal was only entitled to the sum of 8922*l.*, which was covered by a payment by the defendants into Court of 10,000*l.*

The Bank is the Central Bank of Portugal and is incorporated by Special Charter under the Laws of Portugal. Since 1887 it has held from the Government of Portugal an exclusive licence for the issue of bank notes as legal tender in Portugal and the adjacent Portuguese Islands, but this licence does not extend to the issue of bank notes for the Portuguese Colonies. At all dates material to this case the currency of Portugal was composed solely of notes issued by the Bank. The Bank act as bankers to the Portuguese Government and carry on a general banking business, having a head office in Lisbon, a branch office in Oporto, and agencies and correspondents in various towns and places throughout Portugal and the Islands.

The Governor of the Bank is appointed by the Portuguese Government and presides at Directors' meetings. The Directors at all material times selected the names of three of their number, out of which the Government in its turn selected one to act as Vice-Governor. The Directors are appointed by the general meeting of the shareholders. The Government also at all material times appointed a Secretary-General whose duties were defined by art. 66 of the Statutes of 1892. This article prescribed (inter alia) that he shall "satisfy himself of the strict observation of the Bank's statutes and regulations . . . . in order to be able to appreciate the situation of the

Bank as regards the safeguard of the Public interest and of the fiduciary circulation." He did not vote at Directors' meetings.

Messrs. Waterlow are a well known firm of printers having their registered office at 26 Great Winchester Street in the City of London. A considerable proportion of their business consists of bank note and security printing. Under a contract dated November 27, 1922, and a repeat order under that contract dated February 20, 1924, the Bank employed them to print and supply certain bank notes required by the Bank for issue in Portugal. Under this contract and repeat order Messrs. Waterlow supplied to the Bank 600,000 notes of a face value of 500 escudos. The said notes contained on their face a portrait of Vasco da Gama and are referred to as 500 escudos notes of the Vasco da Gama type. These notes were delivered to the Bank in 1923 and 1924, and all or nearly all of them were put into circulation. The value of the escudo at dates material to this case was approximately Two Pence Halfpenny, so that a 500 escudo note was worth approximately *5l.*

The notes of the Bank are at present inconvertible; that is to say, the Bank is under no obligation to replace them when presented by anything else than its own notes. The learned judge found, and the Court of Appeal agreed with him, that the prospect of the notes ever becoming convertible with gold was so remote that it might be disregarded. With that finding I agree. The amount of notes which could be issued was controlled by law. Within these limits it was subject to the policy of the Bank. The right was accompanied by conditions as to the maintenance of reserves and prohibitions as to certain classes of business.

For example: By art. 28 of the Law of July 29, 1887.

The Bank is expressly forbidden from carrying out the following operations:—

(*a*) To purchase for its own account any shares in the Bank.

(*b*) To rediscount its own bills.

(*c*) To carry out any Stock Exchange operations which cannot be immediately liquidated even if for account of third parties.

(*d*) To pay interest on any cash received in account current payable at sight.

(*e*) To promote or take part in the creation of commercial banking or other undertakings.

(*f*) To undertake any risky negotiations or insurance.

(*g*) To buy and sell, for its own account, any commercial goods.

(*h*) To possess real estate and rights apart from the City premises necessary for the carrying out of its functions, except through the effect of any assignment or public sale, or in order to secure the repayment of credits, but it will have to proceed to the liquidation of such goods (or " estate ") within the shortest period possible.

Again, there was an obligation upon them to issue notes on Government service. Finally, it must be remembered that the Bank is a Bank of Issue with control and management of the currency. Its Directors were only entitled to issue notes as far as in their reasonable opinion it was right and proper for them to do so in their capacity as guardians of the currency of the country.

In the course of 1925 Messrs. Waterlow, as it has been found by the Courts below, and as they admitted on appeal, were guilty of a breach of an absolute duty to the Bank under the contracts referred to, because, without authority from or the knowledge of the Bank, they printed and delivered to one Marang van Ysselvere 580,000 notes of 500 escudos of the Vasco da Gama type.

Marang was one of a group of criminals, among whom was the Portuguese Minister at the Hague. The criminals having obtained the notes from the Messrs. Waterlow introduced them into Portugal and proceeded to put a very large number of them into circulation there.

These notes were printed either from the same plates as had been used for the notes printed for the Bank or from plates made from the same die. Each of the Bank's notes bore a serial letter and number and the signatures of the

Governor and one or other of the Directors. 490,000 of the said 580,000 were exact duplicates of notes printed for the Bank and were indistinguishable from the genuine notes delivered to and issued by the Bank except by certain tests unknown to the Bank and depending on data which were exclusively in the possession of Messrs. Waterlow. These tests involved various matters, such as the existence and the significance of minute letters on the genuine and the unauthorized notes and of minute differences between the genuine and the unauthorized notes in the distance from one typographical element to another on the face of the note. The notes were delivered to Marang as to 200,000 in February and March, 1925, and as to 380,000 from August to November, 1925.

In order to facilitate the putting into circulation of very large quantities of these notes the criminals formed a bank known as the Banco Angola e Metropole. Under Portuguese law in order to constitute and operate a bank it was necessary to obtain the authority of the Minister of Finance, who was advised on such matters by a body known as the Banking Council. The Minister of Finance on June 27, 1925, authorized the formation of the Banco Angola e Metropole on the condition, among others, that the capital of that bank, the minimum figure for which he had previously fixed at 20,000,000 escudos, should be fully subscribed. This condition was accepted, and, as the criminals had already received notes to an amount of 100,000,000 escudos from Messrs. Waterlow, they were able promptly to comply with it.

The Banco Angola e Metropole, having been formed, proceeded to carry out transactions on a large scale; but their business fell under suspicion, and upon November 19, 1925, the Minister of Finance instructed the Inspector of Banking Commerce to investigate their activities. On Friday, December 4, 1925, the manager of a private bank in Lisbon called upon Dr. Ulrich, a Director of the Bank, and informed him of certain suspicious dealings affecting the Banco Angola e Metropole at Oporto, and Dr. Ulrich communicated with the Assistant Judge of Criminal Investigation. On the evening of that day a number of officials both of the State and the Bank went to Oporto. On the following day the premises of the Banco Angola e Metropole were searched by the police. Many packets of 500 escudo notes of the Vasco da Gama type were found, but apparently the notes, though new, were not consecutive, nor were the series the same. Instructions were given that all notes of this type in the Oporto branch of the Bank should be arranged in series, and also that 2000 of the notes found on the premises of the Banco Angola e Metropole should be similarly arranged. Late on the night of the 5th, Saturday, or early on the Sunday morning, the 6th four notes, each in duplicate, making eight in all, were discovered among those in the Bank's branch, and this was conclusive proof of forgery.

The Bank's officials returned immediately to Lisbon, and on the Sunday evening a meeting of the Bank's Directors was held. The position was certainly alarming. It was obvious that there were forged notes in existence, but how, when, where and to what extent the forgeries had taken place was entirely unknown. After prolonged consideration, the Bank resolved to withdraw from circulation the notes of 500 escudos, 2nd plate, gold, on which appeared the effigy of Vasco da Gama. The notice was given in the following terms, and was published in the "Diario de Noticias" and in the "Seculo" of December 7, 1925, and other papers :—

"The Administration of the Bank of Portugal has resolved to withdraw from circulation the notes of 500 escudos, 2nd plate, gold, on which appears the effigy of Vasco da Gama.

In view of this resolution, the notes of this type and plate now in circulation are to be exchanged for others of the same or some other denomination at the Head Office of the Bank in Lisbon, at the Branch Office in Oporto and at the Offices of its Agencies on the Continent and in Funchal.

Lisbon, 7th December, 1925.

For the Bank of Portugal.
THE DIRECTORS :
J. Motta Gomes, Junior,
Manuel Casal Ribeiro Carvalho."

The result was a run on the Bank, and in the course of the next few days many thousands of notes both good and bad of the Vasco da Gama type were brought by their holders to the Bank or one of its branches, and for each note so brought into the Bank, the Bank handed to the holder a good note for 500 escudos.

On December 7 the Bank telegraphed to Messrs. Waterlow as follows :—

(Despatched at 2.25 P.M. Recd. 5.14 P.M.)

" Imprimerie,
London. 7th December, 1925.

Great falsification notes of five hundred escudos send expert Lisbon urgently to examine. Make investigations on your side.

Bank of Portugal,
CAMACHO RODRIGUES."

Messrs. Waterlow replied in the following terms :—

" Camacho Rodriguez,
Bank of Portugal,
Lisbon. 8th December, 1925.

Your cable 7th received. Arranging for expert to leave London immediately. Will wire you actual time and departure. Write fully and send specimens.

WATERLOW & SONS, LTD."

(Despatched 12.25 P.M. Recd. 1.56 P.M.)

Sir William Waterlow, accompanied by two other of his directors, had interviews with Colonel Lucas in London, who was acting on behalf of the Bank, and eventually left for Lisbon, where he arrived upon December 13. Meantime the Bank had been exchanging the notes in the way above mentioned.

It ought here to be said that no suggestion has been made or can be made, against the honesty of Messrs. Waterlow. They were, just as much as the Bank was, victims of Marang's fraud ; but when Sir William Waterlow arrived in Lisbon he was an object of suspicion (as indeed the Directors of the Bank themselves had been) and was for a time kept at arm's length.

In the result, the Bank finally found itself in possession of 799,190 Vasco da Gama notes, and of these it was subsequently ascertained that 209,718 were notes printed without authority by Messrs. Waterlow for Marang, and which are hereinafter referred to as "the forged notes."

On December 1, 1925, the note circulation of the Bank consisted of two classes: (1.) notes issued as loans to the Government which the Government would put into circulation, and (2.) notes issued by the Bank for its ordinary commercial needs, against a certain specified reserve of gold much less than the face value of the notes.

The total note circulation in Portugal was about 1,700,000,000 escudos (seventeen million pounds). Messrs. Waterlow had printed and delivered to Marang notes to the value of 290 million escudos, or about one-sixth of the total note issue. Of these, notes to a value of over 100 million escudos (one million pounds) had been put into circulation. They had been put in circulation from time to time from some date in the first half of 1925. They must have passed from hand to hand. Many of them must have been paid into the Bank's head office or some branch office of the Bank, and been re-issued. On such notes the Bank would certainly be liable, and it had no means of knowing whether any note had, or had not, been re-issued.

Notes to the value of 195,630,000 escudos had been authorized against a 15 per cent. minimum gold reserved for the Bank's commercial business as bankers. Of this amount the Bank had, prior to December 7, 1925, issued about 65 million escudos. The unissued balance of about 131 million escudos constituted reserves on which the Bank could draw as and when they required to do so. It may here be stated that, as a result of Messrs. Waterlow's breach of contract, the note issue was increased by approximately 104,859,000 escudos, and the unissued balance was thus considerably reduced.

Within a short space of time, i.e., by July 19, 1926, the Bank obtained a considerable increase in its power to issue notes. The Government, by the Prime Minister, had approved of the original action of the Bank on December 6, 1925, and the delay in regulating the position, as appears from the preamble to the decree of July 19, 1926, resulted from a change of Government, which interrupted negotiations. That decree authorized : (1.) an issue of a hundred million escudos, to be repaid out of the anticipated indemnities from Waterlows. It is not suggested that this loan from a third party can be used to reduce damages due from Waterlows ; (2.) a further issue of a hundred million escudos to be used for commercial operations ; (3.) a further issue of 125 million escudos, to be used in colonial development, which does not affect this case.

The plaintiffs, the Bank, issued a writ upon April 5, 1928, claiming damages for breach of contract and/or negligence and/or conversion. In their statement of claim, the plaintiffs added a count under the Copyright Act, but this and the claims for negligence and conversion were not pressed on appeal, and they relied upon the breach of contract only. Such breach of contract is set out in para. 9 of their statement of claim and is as follows : "In breach of the express terms of the said contract and/or negligently and in breach of the implied terms as set out in paragraph 4 hereof and/or negligently and in breach of the duty set out in paragraph 5 hereof, the defendants between January, 1925, and September, 1925, without the authority of the plaintiffs printed from the said plates and/or from plates made from the said die or dies on paper made to the plaintiffs' specification and bearing the watermark 'Banco de Portugal' and delivered in London to one Marang a Dutchman about 580,000 banknotes of the value of 500 escudos each of the said Vasco da Gama design purporting to be banknotes of the plaintiff Bank."

The particulars of damage originally amounted to the sum of 1,115,613*l.*, but the Bank professed itself willing to give credit for the sum of 488,430*l.*, which they had received in the liquidation of the Banco Angola e Metropole, and so the net claim was 610,392*l.*

By their amended defence, Messrs. Waterlow denied that the contract of November 27, 1922, was subject to the implied terms alleged ; they denied that they were guilty of any breach of the express or implied terms of the contract ; they denied that the Bank had suffered any loss, and alleged in the alternative that, if the Bank had suffered any loss, such loss was caused solely by the Bank's own voluntary act in withdrawing from circulation the Vasco da Gama 500 escudo notes and exchanging them for other notes, although the forged notes or some of them which were in circulation were distinguishable from the authorized ones and although the Bank were under no liability to pay the unauthorized notes; and in the further alternative they alleged that any damage was caused by or contributed to by the negligence of the Bank.

In this state of the pleadings, the matter came before the learned judge. In effect he rejected the contentions of Messrs. Waterlow, both as to the amount of damage and the measure of damage. He, however, was of opinion that by December 16, the Bank knew (or ought to have known) the tests by which they could distinguish some of the forged notes from the authorized notes, and he held that from that date Messrs. Waterlow were not liable for damages in respect of the good notes which they gave in exchange for forged notes. and upon this basis gave judgment for the amount above referred to, and not for the whole of the Bank's claim.

When the matter came before the Court of Appeal, all the learned Lord Justices agreed that the Bank were justified in calling in the Vasco da Gama type notes and exchanging good notes both for the authorized and forged notes, but Greer and Slesser L.JJ. came to the conclusion that the Bank knew (or ought to have known) how to distinguish between the authorized and the forged notes by December 10, instead of by December 16, as Wright J. had held, and acting upon this finding they reduced the damages to a round sum of 300,000*l.* to cover all items. Scrutton L.J. took a contrary view. He was of opinion that the Bank were justified in exchanging all notes up to as late a date as December 26, but he also held that a different measure of damages applied—namely, that the only loss which the Bank had really suffered was the loss incurred in printing new notes to give out in exchange for the Vasco da Gama issue.

In the result, judgment from the Court of Appeal was given for 300,000*l.*, and from that the present appeal is brought.

The main questions in the appeal are briefly :—

(*a*) Whether the Bank, issuing an inconvertible currency, i.e., having a right to issue notes but no obligation to honour them otherwise than by giving in exchange other notes, until some future return to convertibility at a date so remote and unlikely to occur that it could not be taken practically into account, suffered any other than a merely nominal loss (apart from the cost of printing) when they called in bad notes put into circulation by forgers and gave good notes in exchange for them.

(*b*) Whether in the circumstances of this case the bank, when they gave in exchange for a forged note of the face value of 500 escudos a good note of that face value, could properly be said to have suffered a loss of 500 escudos, with the result that Waterlows, who are liable by reason of a breach of contract which enabled the forged notes to be put into circulation, are bound to pay to the Bank 500 escudos converted into sterling at the rate current at the date of the loss.

(*c*) Whether the Bank gave evidence of, or proved, any loss at all.

(*d*) Whether, if the Bank proved any loss, such loss was not caused in whole or in part by the voluntary action of the Bank themselves or was not in whole or in part such a loss as could not fairly and reasonably be considered as arising naturally from the breach of contract or such a loss as could not be reasonably supposed to have been in contemplation by both parties at the time of making the contract as the probable result of the breach, or whether the loss was not aggravated by the failure of the Bank to take reasonable steps to limit the loss.

Messrs. Waterlow, on appeal, did not dispute the proposition that they were guilty of a breach of absolute duty under an implied term of the contract.

It will be convenient to take first the question whether the Bank were justified in exchanging new notes for the Vasco da Gama notes (both authorized and forged) as and when they did. It will be observed that upon this point we have concurrent findings in the Courts below. Both Wright J. and all the three members of the Court of Appeal held that they were, the only difference of opinion being up to what period they were so justified.

In coming to a proper determination of this question, it is important to recollect the position of the Bank both before and after the discovery of the forgeries. It will be recollected that the Bank was in effect the National Bank of Portugal, the sole issuing Bank in that country, and the Bank upon which the credit and currency of the country depended. This appears from the answers given by Dr. Ulrich in his examination-in-chief :—

"Q. 286. Supposing that you had refused to pay any Vasco da Gama notes, what would the effect have been on the public as regards your issue of notes altogether, in your opinion ?

I think the effect would be very extremely serious, because the people, seeing that the Bank were refusing a note of a certain type, would easily have been inclined to think that next day another can be refused in the same way. In these conditions there would have been a general discredit for all the notes of the Bank, that means for the total currency of the country. I cannot really easily foresee the effects coming from such a measure, but it is easy to understand that if anybody has merchandise in his power of a certain and definite value he would have refused to exchange his merchandise against a piece of paper of a doubtful value or discussed value, so the country would have been brought to a general stoppage for the economical life of the country, and naturally the people in Portugal would have taken the most severe violences against the Bank, and I am sure that a revolution would have been brought about by this fact.

Q. 287. In your opinion, that would have been the internal result in Portugal ? Yes.

Q. 288. What about the external result as regards Foreign Exchanges ?

I think the market for Portuguese currency abroad would have been suppressed at once; no bank would have been willing to sell escudos when they knew the escudos were paid in paper of doubtful value and of discussed value, so the Foreign Exchanges of the country probably also would have been stopped."

Similar evidence was given on the Bank's behalf by other witnesses called by them, and the learned trial judge said: "The justification for acting with such promptitude which is put forward, and I think put forward with foundation, was that it was already known and could not be suppressed that there was this great falsification of notes going on, that the only way to avoid a financial crisis and an entire upheaval of the currency was to withdraw this issue, and that there was no opportunity of further delay because the consequences of delay would have been too serious to contemplate. . . . At least 4000 notes ready to be issued had been found in the Banco Angola e Metropole, and what the plaintiffs did was simply done in order to maintain the credit of their currency and of their Bank, and was, so far as I can judge, and as I hold, done reasonably in all the circumstances. It was a necessary and indeed, in all the circumstances, an inevitable consequence of the falsification and circulation of these spurious notes."

Scrutton L.J., commenting upon this, says: "The judge below has found that by December 16 the Bank might have discovered a means of identifying some of the forged notes. The Bank by Government Decree stopped paying all Vasco da Gama 500 escudos notes after December 26. Wright J. has deducted from the damages 80,000*l.*, for notes paid after December 16. As he finds that the Bank were justified in their action on December 7 in calling in the issue and paying all notes, he must have found that they would have been justified when they could distinguish the forged notes, which innocent holders could not do, in refusing to pay some forged notes, while paying others. Such an action in my opinion would destroy all confidence in the paper currency. It was the Bank's own printers who had from the Bank's own plates wrongly put this unauthorized currency on the market. It was indistinguishable to innocent holders from genuine currency, and I cannot think the Bank was bound to sacrifice innocent holders and the reputation of its national currency to protect the printers, the wrongdoers."

In England the law is that a person is not obliged to minimize damages on behalf of another who has broken a contract if by doing so he would have injured his commercial reputation by getting a bad name in the trade: *James Finlay & Co.* v. *N. V. Kwik Hoo Tong Handel Maatschappij.* (1) The evidence is that the Bank—remembering always that they were the issuing Bank of the paper currency—had to protect before anything else the confidence which such currency inspired in the Portuguese public. "What confidence," they asked, "would all the other notes of the Bank of Portugal merit if the Bank did not adopt such a policy?" "It is one," they say, "always adopted and similar to that adopted as a rule by banks of issue, even when they can allege the forgery is manifest and that the public has not taken the precautions necessary in receiving false notes." I have come to the conclusion that the Bank would have been failing in their duty to their shareholders, their customers and their country if they had not taken the step they did.

In my opinion these findings are correct, and the Bank had no alternative on December 7 but to do what they in fact did. They were in a position of extreme difficulty and extreme danger, caused, as I think, by the unfortunate and unwitting breach of contract on the part of Messrs. Waterlow. As the Bank urge, for a country to find that what it believed to be a substantial portion of its legal wealth was nothing more than worthless pieces of paper instead of genuine notes of the Bank would have created an economic panic and confusion which would have caused the gravest damage to the credit of the Bank and might even have shaken the whole economic and commercial life of the country.

I now pass to a consideration of whether December 10, as Greer and Slesser L.JJ. held, or December 16, as Wright J.

(1) [1929] 1 K. B. 400.

held, or December 26, as Scrutton L.J. held, is the correct date for determining when the Bank's knowledge was of such a character as disentitled them from exchanging new notes for the Vasco da Gama notes, both authorized and forged. I would add here that the learned counsel at the Bar of your Lordships' House, arguing on behalf of Messrs. Waterlow, endeavoured to persuade the House that the Bank ought not to have acted so precipitately in giving notice of calling in, and that they must have known by December 9 how to distinguish between the authorized and the forged notes, and so that they ought not to have exchanged any more after that date.

This is largely a question of fact, but, having come to the conclusion that the Bank were entitled to issue their notice on December 7, I reject the argument for Messrs. Waterlow that the Bank acted too precipitately, and the only question therefore remaining is whether December 10, December 16 or December 26 is the proper date to take as being that upon which the knowledge of the Bank was such as disentitled them from paying out further good notes.

It appears to me that Scrutton L.J. was right for his reasons above referred to in rejecting the contention that December 10 or December 16 was the date to be taken as the one upon which the Bank knew, or were in a position to know, how to distinguish certain of the notes. The Bank in fact exchanged new notes for forged notes as late as July, 1927. Logically I can see no reason why they should not claim from Messrs. Waterlow any damage properly flowing in respect of notes so exchanged so late, and upon this showing even the date fixed by Scrutton L.J. of December 26 would have to be reconsidered. I agree, however, that December 26 is the proper date, and for the following reason. By a notice issued by the Ministry of Finance in Portugal it was ordered that December 22 should be fixed as the last day for the exchange of notes. This date was subsequently extended to December 26, and I am content to leave it at that.

What then is the amount of damages to which the Bank are entitled upon that date, subject to the question of the correct measure of damages?

Taking December 26 as the date, it remains to be considered how the sum of 488,430*l.* which the Bank recovered in the liquidation of the Banco Angola e Metropole is to be dealt with. It was contended by Messrs. Waterlow that this sum ought to be treated as salvage in respect of the total loss suffered by the Bank in respect of the unauthorized notes. It was said that in the present action the amount to be recovered was in respect of part only of those notes—namely, 209,718 less 16,000 notes, and that any credit to be given must be based on the same subject-matter—namely, salvage in respect of 209,718 less 16,000 notes, i.e. twelve-thirteenths of 488,430*l.*—namely, 450,860*l.* In my view this is not the true principle applicable. Legally, Messrs. Waterlow may not be entitled to any credit in respect of this sum of 488,430*l.*, as the amount was recoverable against different parties and on a different cause of action. The Bank, however, do not desire to stand upon their strict rights, and in my opinion, if the total amount to be recovered from Messrs. Waterlow added to the sum of 488,430*l.* exceeds the total loss actually incurred, Messrs. Waterlow should have credit for such excess. The Bank's total loss was 1,092,281*l.* plus 6541*l.* Against this, credit should be given for 488,430*l.*, leaving a net loss of 610,392*l.* This is the principle laid down by the Court of Appeal in the case of *The Morgengry and The Blackcock* (1), and it is that principle which in my view should be followed in the present case.

I now pass to the question: What is the true measure of damages?

Two points are taken on behalf of Messrs. Waterlow. They contend:—

(1.) The loss, if any, suffered by the Bank was caused in whole or in part by the voluntary action of the Bank and/or was in whole or in part a loss which could not fairly and reasonably be considered as arising naturally from Waterlow's breach of contract, and was a loss which could not reasonably be supposed to have been in contemplation of both parties at the time of the making of the contract as the probable result of the breach.

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(1) [1900] P. 1.

(2.) The loss suffered by the Bank, if any, was merely nominal, being the present value of the liability at an undetermined and undeterminable future date to give gold or other value for the good notes it issued in exchange for bad notes.

As to (1.), the law is as follows: The leading case in English law is that of *Hadley* v. *Baxendale* (1), where it is laid down by Alderson B., giving the judgment of the Court: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally—i.e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we

(1) 9 Ex. 341, 354.

H. L. (E.)
1932
BANCO DE PORTUGAL
v.
WATERLOW & SONS, LD.
WATERLOW & SONS, LD.
v.
BANCO DE PORTUGAL.
Viscount Sankey L.C.

think the jury ought to be guided in estimating the damages arising out of any breach of contract."

It was similarly stated by Lord Blackburn in the House of Lords in *Livingstone* v. *Rawyards Coal Co.* (1) in these words : " Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." There is no doubt as to the law ; the real difficulty is to apply it to the peculiar facts of this case.

The first question is : " Was this loss one which could reasonably be supposed to have been in contemplation by both parties at the time of the making of the contract as the probable result of the breach ? " This rule has often been criticized on the ground that people when they make contracts do not contemplate their breach. Be that as it may, I have come to the conclusion that Greer L.J. was right in taking the view that it would be naturally in the usual course of things, and would be within the contemplation of the parties (1.) that in circumstances like those which happened in the present case, the Bank would be compelled for their own protection to issue a public notice informing the holders of their notes that the only notes of which forgeries had been discovered were the Vasco da Gama issue ; and (2.) that they would also be compelled in the interest of their own credit and currency to act reasonably in the matter, and (3.) that it would be reasonable to exchange any of those forged notes which were presented for payment for valid notes of an equal value. Once this is found, as it has in my view been rightly found in this case, that the Bank acted reasonably, and it is also found that Messrs. Waterlow committed a breach of contract, the resulting consequences from such reasonable action must be damages which the Bank are entitled to receive in respect of breach of contract,

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(1) 5 App. Cas. 25, 39.

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Viscount Sankey L.C.

because they are damages fairly and reasonably to be considered as arising naturally—i.e., occurring in the usual course of things from such breach of contract—as the probable result of the breach.

As to (2.), I now turn to the last and, in my opinion, most difficult part of the case.

Was the loss suffered by the Bank merely nominal and was the only sum recoverable by them the cost of printing and paper in regard to the new issue ?

Upon this point Wright J. said: "In Portugal these notes are currency. They are the currency of Portugal. They can purchase commodities in Portugal, including gold, which after all is only a commodity like any other, though it is raised in financial affairs to a special pre-eminence as a convenient medium for fixing values, they can buy foreign exchange, that is sterling or dollar exchange, they can buy any exchange in any currency which is convertible and they do that because they have behind them the credit, that is the liability, of the Bank of Portugal."

And Greer L.J. states it in a similar way. He says: "Every 96 escudos issued by the Bank in form of paper notes in exchange for the Marang (forged) notes was worth 1*l.* in English money, because it would buy in Portugal, and by exchange all over the world, the same amount of goods as the pound sterling would buy. . . . . In my judgment the Bank are entitled to say to the defendants 'By your wrong I lost a certain number of escudos worth x pounds, give them back to me in English money at the rate of exchange at the date of my loss.'"

In the present case the Bank, by reason of Messrs. Waterlow's breach of contract, had to increase their note issue by 104,859,000 escudos, and received in exchange for each bank note no value at all, but only worthless bits of paper.

Upon each of the good notes so exchanged, the assets of the shareholders were diminished to the extent of the liability which the Bank assumed for the good note which they had given in exchange for the worthless note.

Some confusion appears to me to have arisen in this case by dwelling too much upon the fact that the notes were not convertible into gold. In my opinion that fact has nothing to do with the case. In a country where there is a managed currency a note when issued by a Central Bank becomes part of the currency of the country and obtains a certain value which may for the moment be called its market value. The fact that it is not convertible into gold is reflected in the price the note fetches in the terms of any foreign exchange. We are not here considering the case of an unlimited right to issue notes. The essence of the right conferred on the bank of issue in this case was the ability, within limits allowed by law, to print and issue its notes as currency and for value. The notes are the currency of the country, and have the value of that currency when issued. Whatever may be the conditions imposed as to reserves and whether the currency is convertible or inconvertible, a bank of issue receives value for every note which it issues.

This consideration has to be kept in view during the whole of the present case. It must never be forgotten that the Bank was a bank of issue. The notes may be advanced as loans to the Government or private persons; they may be used to buy gold or securities, to discount bills or to pay the Bank's debts, and the notes may also be received from a customer of the Bank in order to reduce an overdraft at the Bank. In every instance the Bank obtains the currency value of the notes, or may receive it, in discharge of a liability due to the Bank.

Analogies may be misleading, if not dangerous, in these peculiar and unusual circumstances. The simplest way of posing the problem is to imagine two persons coming into the Bank at the same time, each of them wanting a good 500 escudos note. The first is an Englishman who wants to get some Portuguese money. He hands over to the Bank five English pounds, and gets in return a 500 escudos note. The other person hands over a forged note, and also gets a 500 escudos note. What is the position of the Bank? In the first case it has obtained in exchange for the 500 escudos

Viscount Sankey L.C.

note five pounds in English money; in the second case it has got in exchange for the 500 escudos note a worthless forged note. It is not possible to say that in the second case the Bank has suffered no damage because it could print and issue a third 500 escudos note should it so desire to do. For that note it could also have obtained value. In truth it has lost the face value of the second note by reason of the fact that it has only got a worthless note in exchange.

I am, however, unable to accept in its entirety the argument put forward by the Bank in their Reason 16, where it is stated that the Bank's notes, being the currency of the country, have the same value in their hands as in those of third parties. What exactly is meant by the words "in their hands" it is difficult to appreciate. A bank note is, after all, merely a promise to pay in some form or other. Supposing the Bank had had in its cellars, say, for example, 1000 of these notes, and owing to the negligence of some contractor who happened to be engaged in repairing the premises, a fire had broken out and all the new unissued notes in the Bank's cellars had been burnt, it would not be possible to contend that the contractor whose negligence had caused the loss of the notes would be liable for their face value. He might in such an instance be liable for the cost of paper and printing of each note, but it is a completely different position when the notes, instead of remaining in the cellar, are rightly, as is found in this case in the circumstances, put into circulation by the Bank. Then their value is entirely changed. Again, it is possible to conceive of cases where a person who has been deprived of a chattel by the negligence of another is entitled to recover from such other the replacement value of such chattel, but the present case is not an example of that character. Here the issue of the note and putting it into the currency of the country, which the Bank were entitled to do, makes all the difference.

For these reasons, I am of opinion that the appeal of the Bank succeeds and that judgment should be entered for the Bank for the sum of 610,392*l*. The appeal of Messrs. Waterlow should be dismissed.

Lord Warrington of Clyffe. My Lords, these are two appeals from an order of the Court of Appeal dated March 26, 1931, varying the order and judgment of Wright J. dated January 12, 1931, whereby he directed that judgment be entered for the Bank for 569,421*l.* with costs. The Court of Appeal by a majority (Greer and Slesser L.JJ.) reduced the damages to 300,000*l.*, and unanimously dismissed a cross-appeal by the Bank that this sum should be increased to 611,851*l.* Scrutton L.J. was of opinion that no larger sum than 8922*l.* was recoverable by the Bank. The Bank by their appeal seek to have the damages increased to 610,392*l.* or alternatively to 567,040*l.* Messrs. Waterlow on the other hand seek to have the damages reduced in accordance with the opinion of Scrutton L.J.

It is now admitted by Messrs. Waterlow that they are liable to the Bank in damages for breach of contract, and the only question before this House is as to the damages to be awarded.

I do not propose to restate in detail the facts already related in the opinion of the Lord Chancellor, but only to give a summary sufficient to render my conclusions intelligible.

The Bank is incorporated under the laws of Portugal and holds from the Government an exclusive licence for the issue of bank notes as legal tender in Portugal and the adjacent Islands, but this does not extend to the Portuguese Colonies. At all material dates the currency of Portugal was composed solely of notes issued by the Bank. They act as bankers to the Government and carry on a general banking business with a head office at Lisbon and a branch in Oporto and numerous agencies in other places. At all material dates the notes of the Bank were and they still are inconvertible, that is to say they are not payable in gold, but only in the currency of the State.

The unit of currency is the escudo, nearly equivalent at par to the American dollar and denoted by the same symbol —namely, $. The notes to which the present litigation relates are those of 500$. It is agreed that for the purpose of assessing damages the equivalent in sterling of 500$ would be 5*l.*

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Lord Warrington of Clyffe.

The contract, the breach of which has occasioned the litigation, was made between the Bank of the one part and Messrs. Waterlow of the other part, and was dated November 27, 1922. Under it and a repeat order dated February 20, 1924, Messrs. Waterlow printed and delivered to the Bank 600,000 notes for 500$ each. They are known as notes of the Vasco da Gama type, bearing as they do a portrait of Vasco da Gama on the face. These 600,000 notes as delivered were put into circulation by the Bank in 1923 and 1924.

In 1925 the Bank and Messrs. Waterlow were made the victims of an elaborate fraud on the part of one Marang and his associates, and Messrs. Waterlow were induced, in the belief that they were acting with the approval of the Bank, to print and deliver to Marang 580,000 Vasco da Gama notes. These notes were exact duplicates of the genuine notes printed under the contract, being printed from the same plates or from plates made from the same die. These notes were delivered to Marang as to 200,000 in February and March and as to 380,000 in August and September, 1925, and large numbers were put into circulation by means of a bank known as the Banco Angola e Metropole, formed by the conspirators for that purpose.

It is now common ground that in printing and delivering to Marang the 580,000 notes Messrs. Waterlow committed a breach of their contract for which they are liable to the Bank in damages.

There is no doubt as to the law applicable in such cases. It is sufficient to quote the well known rules laid down in *Hadley* v. *Baxendale* (1) in the judgment of Alderson B.: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should either be such as may fairly and reasonably be considered arising naturally—i.e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be

(1) 9 Ex. 341, 354.

supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of breach of it." Moreover, it is well settled that a voluntary act on the part of the injured party does not necessarily break the chain of causation between the wrong which occasioned the voluntary act and the damages. If the voluntary act is one which would be reasonably expected in the ordinary consequence of a breach of contract it is not a sufficient answer to say that the damage would not have happened but for the plaintiff's voluntary act.

In the present case the introduction by reason of Messrs. Waterlow's breach of contract into the currency of Portugal of a large number of spurious notes indistinguishable from the genuine notes would, if some drastic step had not been at once taken by the Bank, have had an incalculable and disastrous effect on the economic position in Portugal as well as on the reputation and credit of the Bank, as the body responsible for the issue of currency. As a consequence of the discovery, the result of investigations made at Oporto on December 4 and 5, 1925, of the fact that a number of the spurious notes were in circulation, the Bank on the Sunday, December 6, determined immediately to withdraw from circulation the whole of the Vasco da Gama notes of 500$ and to have notices published in the papers of Lisbon and Oporto advising the public that the cashing of the said notes would be effected at once at the chief office of the Bank and at all its branches. Such notices were duly published on the morning of December 7, and from that date onwards until the process was stopped as hereinafter mentioned all notes of the type in question whether genuine or spurious presented at the head office of the Bank or at any branch or agency were exchanged for currency of another type.

It is for the loss occasioned to the Bank by the exchange of genuine currency that the damages in this action are claimed.

On this claim the following questions arise :—

(1.) Was the loss occasioned to the Bank such a loss as in accordance with the rules above referred to could be recovered in damages for breach of the contract ?

(2.) If so, what is the measure of such damages?

(3.) Was there any and what date as from which by reason of matters coming to the knowledge of the Bank subsequently to December 7 they ought as between themselves and Messrs. Waterlow to have ceased to exchange spurious notes for genuine currency and thus have minimized the loss?

(4.) In what way and to what extent ought moneys recovered from the perpetrators of the fraud to be credited to Messrs. Waterlow in reduction of damages?

The first question has been answered in the affirmative by all the judges in the Courts below, and I agree with their decision. It is in my opinion impossible to say that, having regard to the position at the time, and the possible consequences both to Portugal and to the Bank itself of the circulation of the spurious notes, the action taken by the Bank in exchanging all the notes of the type in question whether genuine or spurious for other genuine currency was not a reasonable step to take, and one which might be expected to be taken as a consequence of such a breach of contract as that in the present case.

As to the proper measure of damages there has been a difference of opinion in the Courts below. The majority (Greer and Slesser L.JJ.) in the Court of Appeal and Wright J. in the Court of first instance were of opinion that the proper measure of damages was the face value expressed in sterling of the genuine currency given in exchange for the spurious notes—namely, in the present case 5*l.* per note of 500 escudos, together with the cost of printing the genuine notes so given in exchange. Scrutton L.J. on the other hand was of opinion that the loss was confined to the cost of printing the new notes.

This is a difficult and in this case a very important question, seeing that in one view Messrs. Waterlow would be liable for a very large sum of money, and in the other for nothing beyond the 10,000*l.* paid into Court with their amended defence.

There are no principles applicable except such as are expressed in *Hadley* v. *Baxendale* (1), nor are there any

(1) 9 Ex. 341.

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Lord Warrington of Clyffe.

authorities which are of help. The damages are, however, damages for breach of contract, and in such cases it has to be remembered that they are exclusively measured by a loss actually incurred by the Bank and capable of being quantified in terms of money.

In reaching a conclusion it is essential to bear in mind that the sole measure of damages on which the Bank insisted at the trial, and still insists, is the face value, translated into sterling at the rate of 5*l.* for every sum of 500$ issued by them in exchange for a spurious note. They have maintained throughout that in issuing genuine currency in exchange for spurious notes they must be treated as having expended so much cash without receiving any consideration in return, and therefore to be the poorer by the amount so expended. This is made quite clear by Reasons 16 and 17 in their case. They made no attempt to prove that (except the expense of obtaining the paper and printing the notes) they incurred any other loss or damage, directly or indirectly, as, for example, by the increase in the currency and the consequent depreciation of its purchasing power, or by injury to their credit or interference in their relations with the Government or otherwise. All these considerations may be set aside, and accordingly, in explaining the views I entertain, by "damages" I mean only such damages as are claimed by the Bank. There may be loss or damage of another kind, but this is not in question.

The whole question in my opinion turns on the nature of the obligation incurred by the issuing Bank under the notes it issues. They are in effect promissory notes payable to bearer on demand. So long as they remain in the possession of the Bank they are merely pieces of paper, and if, for example, they were lost or destroyed while in their possession they could be replaced by printing other notes at the cost of the paper and the printing.

As soon as a note is issued it imposes an obligation on the Bank to pay to the bearer on demand 500$. This last is the only material obligation in the present case. There may be two others—namely, (*a*) to pay in gold should the notes hereafter cease to be inconvertible, and (*b*) to pay in some new form of currency should any such new form be introduced, but these possible obligations are contingent only and are of no importance in the present case.

It is proved by the evidence of witnesses called on behalf of the Bank itself that the only material obligation is satisfied by exchanging the note in question for another note of like denomination. If a judgment were recovered against the Bank it would be satisfied by delivery of currency for the amount.

Where, therefore, the Bank elects, as it has done in the present case, to treat the spurious notes as on the same footing as genuine notes, all it does is to accept an obligation to pay the holders in currency, that is to say, in notes. To do so, all it has to do is to take so many pieces of printed paper from its existing stock or to have further notes created should the existing stock be insufficient. In either case, the loss to the Bank is, in my opinion, confined to the expense of procuring the necessary paper and of printing the necessary number of notes.

Wright J., at p. 93 D of the Appendix, says: "They," that is to say, the Bank, "are damaged by having to assume liability on these notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value, just as they would be if they had been issued by some other institution that is not a bank of issue." With all respect, I cannot accept the conclusion of the learned judge. It seems to me that by treating the Bank on the same footing as "any other institution" he ignores the vital distinction—namely, that the obligation incurred by the Bank is merely to pay in other currency which it has power to create for the purpose, whereas the institution not a bank of issue would have to procure the necessary currency by expenditure of money or sale of goods or in some similar way, or pay it out of currency already in hand. In fact, the sixteenth reason breaks down on examination, and its corollary the seventeenth falls with it.

The next question—namely, at what point of time did the exchange of genuine currency for spurious notes cease to be a natural result of the breach of contract, in the view I take as to the measure of damages, does not arise for decision ; but if it did, I should agree with the opinion expressed by Scrutton L.J. at p. 131 of the Appendix, B. to F. He says : "As he (Wright J.) finds that the Bank were justified in their action on December 7 in calling in the issue and paying all notes, he must have found" (namely, in arriving at the conclusion that they should have ceased on December 16 to pay all the spurious notes without distinction) "that they would have been justified, when they could distinguish the forged notes, which innocent holders could not do, in refusing to pay some forged notes, while paying others. Such an action in my opinion would destroy all confidence in the paper currency. . . . It (the unauthorized currency) was indistinguishable to innocent holders from genuine currency, and I cannot think the Bank was bound to sacrifice innocent holders and the reputation of the national currency to protect the printers, the wrongdoers." I think the right, as against Messrs. Waterlow, continued until December 26.

Under the circumstances no question arises as to the sum recovered from other persons.

The result is in my opinion that the appeal of the Bank should be dismissed with costs, and that of Messrs. Waterlow should be allowed with costs.

I need hardly say that it is with great regret, after anxious consideration, I have arrived at the conclusion that I must differ from opinions for which I have the greatest possible respect, but it is some consolation that I do so in good company. I should also like to say that I have been much assisted by the very clear and forcible argument of Mr. Gavin Simonds in reply.

LORD ATKIN. My Lords, in this case your Lordships are, I think, agreed that, as the result of the breach of contract by Messrs. Waterlow, the Bank of Portugal issued 209,718 500 escudo notes in exchange for forged notes innocently

H. L. (E.)
1932
Banco de Portugal v. Waterlow & Sons, Ld.
Waterlow & Sons, Ld. v. Banco de Portugal.
Lord Atkin.

printed by the defendants. The question is what damages can be recovered by the Bank. The contention of Messrs. Waterlow is that the Bank, when it issued good notes to the face value of over 100 million escudos in return for no consideration, suffered no damage at all except the cost of printing the good notes. This would have appeared to me a departure from the ordinary principles of assessing damages ; but it has found favour with more than one judicial personage for whose opinions I have unfeigned respect, and was urged with much apparent zeal by eminent counsel : so that obviously it demands careful examination. The difficulty, it appears, only arises where the person issuing the notes is a bank of issue and where the obligation expressed in the note is not to pay in gold but to pay in paper currency, i.e., other notes of the Bank. In such cases it is said the Bank have only parted with bits of paper and their damage is completely measured by the cost of reprinting the bits of paper. The argument strikes home at the present time where our currency is in the main a paper currency ; and where the Bank of England are under no liability to pay their notes in gold. I hope to satisfy your Lordships that if the Bank of England by fraud or breach of contract are induced to issue a million pounds worth of notes for nothing they are entitled to recover against the wrongdoer a million pounds in damages. The result of the present contention is sufficiently striking. If the issue of 10,000$ good notes by the Bank of Portugal for nothing involves them in no loss, it would seem to result that the issue of a similar amount for goods or obligations of an equivalent value would be complete gain. The Bank, therefore, when it creates a good debt for 10,000$ by advancing that amount in notes to its customer will appear to have increased its assets by 10,000$ without adding to its liabilities ; similarly, when with the same sum it buys a 100*l.* gold bond or the equivalent amount of bullion. It follows that it makes no difference to the financial position of the Bank whether in exchange for a good note it receives a good note or a bad note. I should have thought this result, in the language of one of your Lordships, " manifestly impossible " ; but rules of law have to be tested in these days, and must survive the application of first principles.

A bank note is a promissory note issued by a bank payable on demand. The English note contains the promise on the face. The Portuguese note does not, but there is competent evidence in this case that the note has the same effect. So far the banker issuing his note incurs precisely the same liability as a merchant issuing his note. If either fails to pay he is liable for the face value of the note. One Bank becomes alone entitled to issue notes; and let us assume that they have become currency so that they can be tendered in discharge of a debt: the position of the Bank remains the same. It is liable on its note. If its note is payable in gold, then to a claim on a note the Bank must pay in gold; otherwise, on debts in general, the Bank as well as private traders will pay in currency; and, as I have said, on default will be liable to judgment for the face value. In any civilized State it will not be permitted to issue notes to an unlimited amount; it will, if honestly conducted, in any case determine its obligations by its possible resources; but the State will require that behind the promises to pay there stand solid resources in the form of gold and liquid securities; and will impose a positive restriction on the issue of notes beyond an amount which it considers necessary. But this has no bearing on the liability of the Bank to pay the face value of a note when issued. Now let us assume that the State alters the law by decreeing that the bank notes need no longer be paid in gold. While that decree lasts the notes are inconvertible, the currency is in the ordinary sense a paper currency. This happened in Portugal in 1891 by a moratorium directed to payment in gold which has been continued in Portugal ever since. The position has not altered. The merchant is in precisely the same position as before; he must pay in currency which will as before be notes, but now inconvertible notes. If he fails to pay he can be sued for the face value of his promissory note. The Bank is for the first time put in the same position as the merchant; it is bound to pay on its note; but it need only pay its note in currency, i.e., in its own notes; and if it will not or cannot so pay, it can be sued for the face value of the note. Mr. Simonds, for Messrs. Waterlow, produced an analysis of the obligation of the Bank in issuing an inconvertible note with which in substance I agree. It is: (1.) to pay in other notes; (2.) when there is a return to gold, to pay in the decreed amount of gold; (3.) if other currency is decreed, to pay in that other currency. But how this helps him it is difficult to see; for on examination it will be found that the obligation of a trader on his note is precisely the same, except that (2.) will probably only be to pay in notes convertible into gold instead of paying in gold itself. Now in the case of a private trader it appears to be conceded that his loss in similar circumstances would be measured by face value. On this analysis the obligation of the Bank would appear to be the same. That it meets its obligation on its note by issuing a further note seems to have no effect upon the nature or amount of the original obligation; the original obligation is met by a renewal, the Bank have only gained time, not increased or decreased an obligation which would be measured just as before. They have in fact done exactly what the merchant has done: they have paid in currency; and their obligation is measured in the same way. If they had an unrestricted right of issuing notes their obligation would not be altered; they would still be liable to be sued on default for the face value of the note, but the effect of the unrestricted power would presumably be that the face value of the note would have a much lower exchange value than if there were a restricted power: so that the Bank would either have received little value originally or the holder of the note would intermediately have suffered loss on the diminution of the note value. But, in fact, in the ordinary course of civilized government, as in Portugal, restrictions still continue. In the present case in 1925 the issue of notes by the Bank for commercial purposes was restricted to 195,000,000$, of which they had issued 64,000,000$, leaving a power to issue of 131,000,000$. In addition, the State from time to time had authorized the Bank to issue notes for State purposes, supporting these notes by a borrowing from the Bank secured by State marketable bonds. Restrictions as to proportions of gold and securities reserves still continued in existence so far at any rate as the issue for commercial purposes was concerned. Let us assume, as might well have happened, that the forged issue, instead of amounting to 100,000,000$, had amounted to 131,000,000$. If the Bank had taken the same action they would have issued promissory notes to the full extent of their legal power. When sued on the notes so issued in exchange for the forged notes they could not have issued their notes in payment; they could have been sued for 131,000,000$, and judgment must have gone against them for that sum. Of course, this never would have been permitted by the State, but ex post facto relief has nothing to do with the question of legal obligation. I therefore find the position to be that the Bank by issuing its note like the trader issues its promise to pay a fixed sum; issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader, it is liable on default to judgment for the face value exigible out of its assets; and, like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred.

It may be noted that this liability to pay the face value is not in the least affected, as has been suggested, by the question of convertibility. Whether the obligation is to pay in gold or in paper, the liability remains the same to pay 500 escudos, and a judgment on the note would be for precisely the same sum. The exchange value and the face value are quite different matters. 500 escudos in gold will exchange for many more goods and much more foreign currency than 500 escudos in paper; as Messrs. Waterlow would have found to their cost, if they had printed these notes when they were convertible into gold. The damages then claimed would have been twenty million pounds sterling instead of a million. Another way of illustrating the position seems to be this. If a person is wrongfully induced to part with a valuable thing, whether it be goods or choses in action, his measure of damages is the value of the thing at the time he parted with it. The cost of replacement does not enter into the measure of damages at all. If a man is fraudulently induced to part with 500 standards of timber he recovers the value at the time; it is quite immaterial that he could have replaced the timber—say, from the Russian market—at a small portion of the value. If he manufactures for 1*d.* articles which can sell for 6*d.*, the measure of damages against the wrongdoer is 6*d.*, not 1*d.* So if he was by fraud induced to promise to deliver 500 of the 6*d.* articles so that the contract could be enforced by an innocent holder of the contract, it appears to me that on well established authority the damages would be 12*l.* 10*s.*, not 2*l.* 1*s.* 8*d.* This means that, whether he parts with goods or parts with an obligation, the measure of damages is the market value of what he parts with, which means what it will exchange for; and this necessarily means in the case of an obligation expressed in currency of the country the face value of the obligation. If he incurs an obligation to pay pounds sterling, you do not inquire at what cost he will acquire the pounds sterling necessary to fulfil the obligation; he may get them by getting some one to produce an article at much less cost which he can sell for the equivalent sterling; he may get them from a benevolent uncle or from some one who for a small premium has undertaken to make good his loss. Whatever the liability incurred, the measure of damages is market value, which in the case of an obligation to pay currency is face value. Some confusion has been introduced into the discussion by considering the question as though the Bank had "lost" the bank notes. If the notes had been "lost" before the Bank had made them the Bank's contractual obligation by delivery the proposition of the defendants would be correct. The notes in such a case are nothing but a collection of bill stamps completed, but not delivered; to destroy them would but have the same result as burning a man's cheque book whether the cheques were filled up and signed or not. I doubt myself whether Reason 16 of the Bank's case ever meant to contend anything so unsound as is suggested; it was probably meant to be read together with the rest of the reasons. But I am quite satisfied that such a fallacy never entered into the head of such an experienced lawyer as Wright J. Throughout his judgment he is speaking of the liability of the Bank on the notes, and he finishes his judgment on this point by these words: "They say they were damaged by having to assume liability on these notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value just as they would be if they had been issued by some other institution that is not a bank of issue." I have already stated my grounds for believing this statement to be correct. For my part I cannot see the way to decide this case for Messrs. Waterlow without reversing a number of authorities which have governed our commercial law, as I understand it, from earliest times.

There is one final and conclusive proof of the fallacy of the defendants' contention to which I have not yet heard any answer. By issuing a note the Bank provide the holder of it with a piece of currency which he can bring to the Bank the next day and compel the Bank to receive in discharge of his overdraft or in payment under a contract to buy securities or bullion. By issuing 100 million escudos in notes they provide the public with the means of coming to the Bank and depriving it of 100 millions' worth of assets in debts, securities and gold. I say debts, for even Messrs. Waterlow's contention does not suggest that a debt payable in paper currency is worth nothing, or that if the debtor is solvent it is not worth its face value. If the Bank releases a debt of 500 escudos it loses 500 escudos. If it parts with 500 escudos' worth of gold it loses 500 escudos; but if it issues for nothing a 500 escudo note to-day by the return of which to-morrow the debt of 500 escudos is discharged or the 500 escudos' worth of gold is bought and paid for it loses nothing. I refuse to proclaim to business men in this country or abroad that our law is so unreasonable. It is with respect no answer to say that when the note is returned it can be used again for value. In fact, strictly speaking, it is not available; the note when returned is discharged, and the reissue of it

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Lord Atkin.

creates a fresh obligation; but the answer to that suggestion is that notes issued for value can also, when returned, be reissued; so that the contention again amounts to this, that – note + value = – note, a proposition which I do not wish to qualify with an epithet.

On the general question as to the number of notes in respect of which damages are to be claimed which turns upon the day upon which it could be said that the Bank no longer reasonably could continue to pay good notes for bad, I agree entirely with the view expressed by Scrutton L.J. I put the question in that form, for it was conceded at the bar that at any rate there were some days at the beginning in which the Bank's action was reasonable and was the natural result of the defendants' default. Without such a concession I think the views expressed by all the judges below correct on this point. The majority of the Court of Appeal limited the damages by fixing on December 10 as the day upon which the Bank could have obtained full information if they had acted reasonably. I cannot agree with this. It seems to me disproved by the fact that Messrs. Waterlow, though on December 9 they had reason to suspect the Marang transaction, did not in fact give the necessary information on that day or the 10th, though they were in fact writing to the Bank on that day; in fact, they never imparted the relevant information at all except in a deposition to the police magistrate. I also think that the trial judge, with whose admirable judgment I agree on almost every other point, took too early a date for closing the transaction. It seems to me that once the exchange began it had to continue until the end of the period fixed by the Bank in conjunction with the Government, which is December 26. On the whole I think that notes exchanged after that date must be treated as benevolences by the Bank.

It only remains to consider how far the damages are to be reduced by the sum recovered from the actual conspirators, a sum of about 400,000*l*. Wright J. has apportioned this sum over the total loss of the Bank, thus reducing proportionately so much of the total loss as has been recovered from Messrs.

Waterlow. This seems to me to be incorrect in principle. The Bank's claim against Messrs. Waterlow would be say 1,000,000*l.*, but they cannot recover more from the defendants than their nett total loss. This is to be ascertained by taking the total amount of their loss, not merely that part of it which is recoverable from Messrs. Waterlow, and deducting from the total the amount recovered elsewhere. This is the principle laid down in *The Blackcock* (1), where a ship was injured by the negligence of both tug and tow. The owners recovered judgment for the full amount of the damage from the tow, but only obtained a sum of 850*l.* from the proceeds of the judgment: they then proceeded against the tug and it was found that both were to blame; the plaintiffs therefore were only entitled to half their damage, about 2000*l.* But it was held that the defendant was not entitled to credit for either the whole or a proportionate part of the 850*l.*, for the two sums together did not make up the total loss. The decision seems to fit this case exactly, and I think is rightly decided. The result is that the Bank's total loss on 209,718 false escudo notes paid by the Bank at the agreed rate of exchange is £1,092,281

To this must be added the cost of the genuine notes printed by Waterlows and rendered valueless	6,541
	1,098,822
The total amount recovered from the conspirators is agreed at	488,430
The Bank's nett loss is therefore . .	£610,392

The actual notes paid up to December 26 exceed 200,000, so that the total claim against the defendants without any credit far exceeds 610,392*l.* The result is, after being given credit against the total loss suffered by the Bank, the plaintiffs are entitled to judgment for 610,392*l.* In my opinion, therefore, the appeal of the Bank should be allowed, and the judgment of the Court of Appeal should be set aside, the judgment directed by Wright J. to be entered for the plaintiffs should be varied by increasing the sum there mentioned to 610,392*l.*, and the plaintiffs should have the costs here and in both Courts below. The appeal of the defendants should be dismissed with costs here and in the Court of Appeal.

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(1) [1900] P. 1.

LORD RUSSELL OF KILLOWEN. My Lords, both in the Court of Appeal and in this House, Messrs. Waterlow admitted that their contract with the Bank of Portugal contained an implied term that they would not print or deliver Bank of Portugal bank notes without the authority of that Bank, that in printing and delivering the notes to Marang they had committed a breach of that term, and that they were liable to the Bank in damages for that breach. The case was still further narrowed here, because the Bank based their claim to damages solely upon breach of contract. The arguments related only to the amount of such damages; other matters which have at one time figured in the case, such as conversion, negligence and passing off, may be disregarded.

The case divides itself into two very distinct branches—namely: (1.) consideration of the question whether the Bank have proved that Messrs. Waterlow's breach of contract has caused them damage beyond a certain sum of 8922*l.*; and (2.) consideration of the conduct of the Bank in treating Marang notes as if they were authorized notes, particularly in relation to the question whether any date can be fixed on or after which the Bank could no longer so act at the expense of Messrs. Waterlow.

The sum of 8922*l.* above mentioned represents the cost of printing (*a*) the genuine notes which were withdrawn from circulation, and (*b*) the notes which were given in exchange for Marang notes. This damage, it is admitted, the Bank suffered. To that extent damage, as a result of Messrs. Waterlow's breach of contract, was proved.

I will start with the first branch, which raises a problem both novel and difficult.

The Bank's claim is simply this: That having given 209,718 good notes in exchange for mere bits of paper, they have lost the face value of each note so given in exchange. The loss of 500 escudos is, according to the Bank, the inevitable consequence of the gift of the note. The language in which this loss is expressed varies at times. In para. 31 of the Bank's case here it is stated that: "The Bank claim the value of the escudos which they had to part with for nothing." In para. 39 they say: "The Bank paid out 104,859,000 escudos in exchange for unauthorised notes. At . . . . the then rate of exchange the sterling equivalent of this sum is 1,092,281*l*." They treat the matter as though, being the owners of assets worth over a million sterling, they had parted with those assets (or had incurred an immediate liability to part with assets of that value) receiving nothing in return. Therefore they claim that they did in December, 1925, suffer, and have now suffered, damage to that amount.

Wright J. accepted this view. As I read his judgment he treated bank notes while in the hands of the Bank as of the same value as in the hands of any other person, and held that the Bank therefore lost that value when they issued a note in exchange for a Marang note. The pith of his judgment upon this point is contained in five lines in which he says: "They say they are damaged by having to assume liability on those notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value just as they would be if they had been issued by some other institution that is not a bank of issue." Those five lines are the basis of his judgment on this head, and are re-echoed in the sixteenth reason of the Bank's case here—namely: "Because the Bank's notes being the currency of the country have the same value in their hands as in those of third parties."

Greer L.J. says: "Every time they issued good notes to the value of 500 escudos in place of worthless notes, they lost the market value of 500 escudos." In another passage he phrases it thus: "In my judgment the Bank are entitled to say to the defendants, 'By your wrong I lost a certain number of escudos worth *x* pounds, give them back to me in English money at the rate of exchange at the date of my loss.'"

And the Lord Justice makes this additional statement: "If my purse containing 5*l.* is stolen I do not recoup my loss because I have an unused balance in my bank out of which I can draw by cheque another 5*l.* The damage I have suffered is still 5*l.*, not merely the 2*d.* I have to pay for the cheque form." Here again is Reason No. 16.

Slesser L.J. seems to rest his judgment on the question whether the Bank had established damage beyond cost of printing, upon a twofold basis. His language is as follows: "Now in the case of the issue to cover the exchange of the Marang notes, the Bank received nothing in respect of this issue. To all intents and purposes it gave away 209,000 odd notes, worth on the exchange about 5*l.* each, receiving nothing in exchange; and I cannot see in these circumstances—the notes of Portugal being currency within that country and exchangeable as we are told at 96 escudos to the £ in London—why the Bank cannot say that by being compelled to issue this currency for no value, and thus proportionately to deplete their further power to issue, they have suffered damage to the extent of this value of the notes."

All three judgments are founded upon this view: That the Bank in December, 1925, suffered damage to the extent of over a million pounds sterling, by having in that month paid away 104,859,000 escudos.

If this view correctly represents the position, then the Bank would on the giving of each good note in exchange for a bad note become in fact poorer by the face value of the good note, and there could be no doubt that damage to that amount had been sustained by the Bank. But in my opinion this view does not represent the facts, but overlooks the exceptional situation which arises when a bank of issue issues notes constituting an inconvertible currency.

It is necessary to state a few facts as they existed in December, 1925, in order to appreciate the situation at that time.

The Bank were a Portuguese Joint Stock Company which acted as bankers to the Portuguese Government, and which ever since 1887 had enjoyed an exclusive licence to issue their own notes as the only legal currency in Portugal. The capital of the Bank was 13,500,000 escudos in fully paid shares with limited liability. There were two species of issue and of notes in circulation—namely, one destined for the banking operations of the Bank, the other applied as loans to the Treasury. The limit of the right of issue for banking operations was between 195 and 196 million escudos; notes for this purpose had in fact been issued to an amount between 64 and 65 million escudos, leaving an unexhausted power of issue to an amount of about 131 million escudos. Notes issued on Government account amounted to 1640 million escudos, so that the total issue of authorized notes amounted in December, 1925, to a face value of 1704 million escudos or thereabouts. The loans to the Government bore interest only at 1 per cent. per annum, of which five-eighths fell to a sinking fund. None of the Bank's notes were payable or redeemable in gold or silver. A period of inconvertibility had been established in 1891 and was still continuing, with no likelihood of its ever being determined. The only liability of the Bank, so far as concerns paying or redeeming a note when presented at the Bank, was to give in exchange for it another note or notes of equivalent face value. Each note when issued by the Bank became in the hands of the holder legal tender, and any such note if paid to the Bank by a debtor to the Bank must be accepted by the Bank in discharge pro tanto of the debt.

That being the condition of affairs, when the Bank gave a good unissued note in exchange for a Marang note did they become poorer to the amount of 500 escudos either by parting with 500 escudos or by incurring an immediate liability to part with 500 escudos? That appears to me to be the crucial question; and the answer seems to me to depend upon a correct appreciation of what happened when the Bank issued the good note to the holder of a Marang note, and a correct statement of the obligations which the Bank assumed by the issue of that good note.

As already pointed out, Wright J. and Greer and Slesser L.JJ. were of opinion that the Bank in issuing the note were parting with 500 escudos. It is true that Wright J. also refers to the Bank assuming a liability in issuing the note, but I think he bases his judgment on the former view, for he expressly treats the case as if it were just the same as a case where a bank has been deprived of a note issued by some other authority.

In my opinion the Bank parted with no escudos. They issued something which in the hands of the recipient was currency of Portugal and legal tender for payment of indebtedness up to 500 escudos, the form of that currency being, not any metal or other substance of value, but a piece of paper by virtue of which an obligation was incurred by the Bank to the holder thereof. While that something was in the possession of the Bank it could have no value assigned to it, for an obligation by one to himself is nothing worth. The value attaches to the note when it is issued to the holder; but the value does not quit the Bank, and leave the Bank so much poorer. The value attaches to the note when the Bank issue it, and thereby undertake an obligation to the holder. The Bank are affected not by the parting with anything which they possessed but by the incurring of an obligation.

My Lords, that in my opinion is an accurate statement and a complete statement of what happened when the Bank issued a good note to the holder of a Marang note. If that be so then it must follow that the judgments below cannot stand, in so far as they are based upon the view that the Bank parted with or lost escudos to the amount of the face value of the good notes which were given in exchange for Marang notes. In truth this view was the outcome of the erroneous belief that there was no distinction to be drawn between a note of the Bank of Portugal in the possession of that Bank, and the same note in the possession of another bank or individual; a belief which in terms emerges in the judgments of Wright J. and Greer L.J. and which underlies the Bank's 16th reason.

This belief is clearly ill founded. This was indeed admitted in your Lordships' House; and the Bank's argument proceeded upon the footing that by reason of the obligation incurred by the Bank in issuing a good note and of the fact that they had received nothing in return, they had necessarily suffered damage to the extent of the face value of the note. I say "necessarily," for the Bank made no attempt to prove this by evidence. It must, if the Bank are to succeed, be a case of the thing speaking for itself. I have to deal with this in some little detail, because it appears to me that with the disappearance of Reason 16, there disappeared also the Bank's only basis for claiming the face value of the notes, without giving affirmative evidence of the damage which they had sustained.

What then was the obligation which the Bank incurred ?

Mr. Gavin Simonds, in the course of an admirable argument which leaves me much in his debt, defined this obligation with I think complete accuracy. It is threefold —namely : (1.) To give in exchange a note or notes of equivalent face value each carrying a similar obligation. (2.) If and when it is hereafter decreed that the notes are to be redeemed in gold, then on demand such quantity of gold as may be decreed. (3.) If and when it is hereafter decreed that some new form of currency shall be legal tender, and that the Bank's notes are to be paid in such currency, then on demand to pay the proper amount of such currency.

The problem then is to quantify those obligations in terms of money. What is the sum which will compensate the Bank for being forced to undertake those obligations ? How much worse off is the Bank likely to be by having to fulfil them ?

To say that by having to fulfil them the Bank will *necessarily* be worse off by the face value of each note given in exchange for a Marang note seems to me, with all respect to those who think otherwise, manifestly impossible. Such a conclusion should surely be based upon some evidence. Could any evidence hope to establish it ? For myself I can see no such possibility. The first obligation carries no loss to the Bank except the cost of providing the new note. The second obligation is so far removed from actuality that both the Courts below treat it as a nominal matter. The third obligation is purely contingent and even hypothetical. But let me again remind the House that even if some appreciable degree of damage could arise to the Bank by the assumption of this threefold obligation, it was incumbent on the Bank to prove it. This task they never attempted.

It was, however, argued that damage had accrued to the Bank in other ways by reason of their having been forced to issue notes, getting nothing in return.

It was said that the Bank had assumed an obligation, getting nothing in return. That is true. It was then said that the value of that obligation was the value of the note in the market—namely, 500 escudos. The same argument assumed another form—namely, that the sum in sterling which the Bank claimed to recover from Messrs. Waterlow was the exact amount which it would have cost Messrs. Waterlow at the relevant date to purchase 209,718 notes in order that the Bank's liability thereon might be cancelled. When the value of the obligation is alleged to be value of the note, that can only mean that that is the value to the note-holder of the fulfilment by the Bank of their obligation. It by no means follows that 500 escudos represents the cost to the Bank of that fulfilment. But in assessing damages for a breach of contract the question is not what sum will it cost the defendant to repair his breach, but what loss has the plaintiff sustained by reason of the defendant's breach. In many cases, possibly in most cases, the answer to each question would be the same sum. It would be the same here if Reason No. 16 were true, and if the Bank had really parted with 500 escudos with each note issued in exchange for a Marang note.

Further, it was argued that in respect of each note so issued the Bank had lost the consideration which they would have received if they had issued the note for the purposes of their banking business. There is no ground for assuming that all or indeed any of the notes would have been issued for this purpose rather than for Government purposes. Assuming, however, this fact in the Bank's favour, this argument as it appears to me adds nothing. It only means that the Bank have assumed a liability without receiving any consideration. The true question still remains; what damage have they suffered by assuming the liability which each issue involves?

Another argument centred in the allegation that each note issued in exchange for a Marang note, being legal currency, could be applied by the holder and must be accepted by the Bank in payment of a debt due to the Bank, although at the time of its issue nothing had been received by the Bank. True; but this consideration will not per se justify the view that the Bank must *necessarily* be worse off by the face value of every note so issued; for who can say that all or any or how many notes so issued, will be so applied? The Bank are affected once and for all by the fact, and only by the fact, that at the moment of issue of the note in exchange for the Marang note they assumed the threefold obligation described above; and we come back always to the same question: What sum represents the damage suffered by the Bank in December, 1925, when they assumed that obligation?

Finally, it was urged that if and when the Bank went into liquidation, and the assets of the Bank were realized and applied in payment of their creditors, the increased liability assumed in December, 1925, would necessarily occasion a diminution of the surplus (if any) available for the shareholders. This indeed was the argument of Dr. Ulrich in the witness box. Few events are less likely to happen; but if this event ever did happen as described, and the creditors were paid in full, the shareholders would not necessarily suffer a loss. For according to one theory with the increase of the number of escudos in circulation there follows an automatic decrease in the value of escudos and an automatic increase in the value of assets measured in terms of escudos. But though this argument might be advanced in support of a claim to some damage beyond the cost of printing, it appears to me to be of no assistance towards establishing the Bank's proposition that the measure of their present damages must be the face value of the notes.

When all is said and done the position is this. The Bank make no claim based on curtailment of their powers of issue,

H. L. (E.)
1932
BANCO DE PORTUGAL
v.
WATERLOW & SONS, LD.
WATERLOW & SONS, LD.
v.
BANCO DE PORTUGAL.
Lord Russell of Killowen.

or based on loss of profitable business. They make no claim for damages resulting from the introduction of 209,718 Marang notes into the existing currency of 1704 million escudos. They make one claim only—namely, that every time they issued a good note in exchange for a Marang note they suffered damage to the extent of 500 escudos. In support of that claim they offered no evidence; they pinned their faith to the proposition contained in the 16th Reason. When that is shown to be false, nothing remains to support their claim.

One of your Lordships in his speech has, in effect, accused those of us who differ from him in this case, of upsetting a number of authorities governing our commercial law. Personally, I am unconscious of any such assault upon authority. I am only conscious of deciding that the Bank have not proved that they have suffered the enormous damages which they claim to recover from Messrs. Waterlow. I confess, however, that I derive some consolation from the knowledge that, in this alleged act of violence I am abetted by one whose pre-eminence as a commercial lawyer is both well established and long established.

Upon this part of the case I am in agreement with the view expressed by Scrutton L.J.—namely, that the judgment of Wright J. should be set aside and judgment entered for the Bank for the sum of 8922*l*. I would accordingly allow the appeal of Messrs. Waterlow and dismiss the Bank's appeal.

A majority of your Lordships, however, think otherwise, and are of opinion that the Bank have proved that in issuing a good note in exchange for a Marang note they suffered immediate damage to the amount of 500 escudos. Messrs. Waterlow upon that footing are prima facie liable to the Bank in the sum of 104,859,000 escudos or (converted into sterling at the appropriate rate and date) 1,092,281*l*. This indeed would appear to be something in the nature of a windfall for the Bank; for the introduction into a total issue of 1704 million escudos of less than 105 million bastard escudos will have resulted in the Bank recovering a sum amounting to more than seven times their paid up share capital.

There remains the question whether in the circumstances of this case a date can be fixed by reference to which the Bank were not entitled to charge Messrs. Waterlow with the damage sustained by reason of the exchange of good notes for Marang notes subsequently thereto.

Wright J. fixed such a date as December 16, 1925. Greer and Slesser L.JJ. fixed it as December 10, 1925. Scrutton L.J. fixed it as December 26, 1925, being the date which by the Bank's public notice, issued in concert with the Government, was fixed as the last day on which Vasco da Gama 500 escudos notes would be exchanged.

Upon this part of the case I do not intend to trouble the House. At this point my dissent comes to an end, and we all find ourselves in agreement with Scrutton L.J.

The circumstances of this case are very exceptional. The forged notes only fail to be real because their printing was unauthorized. They were printed from the Bank's own plates. Long before there was any possibility of detection they had been circulating in large quantities. Numbers of them may have obtained the status of validity by having been received and reissued by the Bank and its numerous branches. There was no possibility of ascertaining which Marang notes had in this way acquired enforceable rights. This feature of reissue strikes me as being of overriding importance.

In these circumstances I am of opinion that it cannot be effectively contended either that the Bank should not (down to and including December 26, 1925) have honoured all Marang notes, or that such damages as flowed from that course of action are not damages which fall within the test of *Hadley* v. *Baxendale* (1), and for which Messrs. Waterlow are liable.

LORD MACMILLAN. My Lords, there is already on record in the admirable judgment of Wright J. an adequate account of the fraud perpetrated by Marang and his fellow conspirators on Messrs. Waterlow & Sons and the Bank of Portugal. It is therefore unnecessary to detain your Lordships by recounting afresh the dramatic circumstances of a crime for which in the ingenuity and audacity of its conception and execution it would be difficult to find a parallel. The present appeals are concerned with the civil consequences of that crime, and in particular with the estimation and attribution of the loss which it has occasioned.

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(1) 9 Ex. 341.

As regards Messrs. Waterlow & Sons, the result of the fraud practised upon them was to cause them, without the authority of the Bank, to print 580,000 Bank of Portugal notes of 500 escudos each of the Vasco da Gama type from the plates which were in their possession as the Bank's printers and to place these unauthorized notes at the disposal of the conspirators. As regards the Bank, the result of the fraud was the debasing of the currency of Portugal, for the validity of which the Bank as the central bank of issue of the country was responsible, by the introduction into it by the conspirators of a large number of these spurious notes.

It was conceded by Messrs. Waterlow that it was an implied term of the contractual relationship subsisting between the Bank and themselves that they should not print notes from the plates in their possession except on the direct orders of the Bank. As they in fact printed and delivered 580,000 notes to the conspirators without any order from the Bank, there can be no question, and it was indeed frankly admitted by Messrs. Waterlow, that their action in so doing constituted a breach of their duty to the Bank. For any loss attributable in law to this breach of duty which the Bank can prove that it has suffered Messrs. Waterlow admit liability. The debate at your Lordships' bar consequently centred round the problem: What loss for which Messrs. Waterlow are legally responsible has the Bank of Portugal sustained by reason of the unauthorized printing and introduction into the currency of Portugal of the spurious notes in question?

Now it was admitted that the Bank on discovering that a large number of spurious notes had been surreptitiously introduced into the currency of Portugal was not only

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Lord Macmillan.

entitled but bound in its own and the public interest to adopt remedial measures for the protection of the currency. The step which it took was to publish at once a notice intimating that it had resolved to withdraw from circulation the entire vitiated issue of 500 escudo Vasco da Gama notes in the hands of the public and on their presentation at the head office or branches of the Bank to give other notes in exchange for them. In pursuance of this notification the Bank honoured all the 500 escudo Vasco da Gama notes which were presented to it for exchange, spurious and genuine alike. That the withdrawal of the whole issue was a reasonable and indeed the only practicable step for the Bank to take in order to remedy the situation which had arisen was hardly contested by Messrs. Waterlow. They directed their criticism rather to the way in which the Bank carried out its policy. In the first place they argued that the Bank acted precipitately, and that if it had delayed the announcement of the withdrawal of the notes for a short time the means of discriminating between the spurious and the genuine notes, which admittedly the Bank did not at first possess, would have been available to it and it could have refused to honour the notes ascertained to be spurious. In the next place they argued that if the Bank had at first no alternative but to honour spurious and genuine notes alike by reason of its inability to distinguish between them it should have ceased to honour the spurious notes whenever it had acquired or could have acquired the means of discrimination. Neither of these criticisms of the Bank's action is in my opinion warranted. The Bank in my view was justified in taking immediate action when it did, for the fact of the existence in the currency of a large number of spurious notes became a matter of public knowledge almost simultaneously with its discovery by the Bank, and if a panic was to be averted it was essential to take action at once. I equally think that having properly announced the withdrawal of the notes and its intention to honour all such notes in the hands of the public, it was not possible for the Bank to alter its policy until a reasonable time had been given to the public to effect the exchange. To have honoured the spurious notes so long as it could not tell them from the genuine notes and then to cease to honour them when it acquired the means of discrimination would have created a second panic, and such a course of conduct on the part of the Bank would have been grossly unfair. If the only way to avoid a panic was to honour good and bad notes alike, as I think in the circumstances it was, the Bank's ability to distinguish between them becomes an irrelevant consideration. Moreover the Bank was quite unable to say with regard to any particular spurious note presented to it whether it had not itself unwittingly reissued it into circulation and so become responsible for it.

I confess I am not disposed to regard with much sympathy the criticism which Messrs. Waterlow have directed at the Bank's action. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. On this part of the case I find myself in agreement with the reasoning of Scrutton L.J. In my opinion the action of the Bank in honouring all notes of the type in question, genuine and spurious alike, between December 7 and December 26, 1925, was reasonable and justifiable in the circumstances, and Messrs. Waterlow ought to be held responsible for whatever loss was occasioned to the Bank by the adoption of that policy. I have taken December 26 as the limiting

H. L. (E.)
1932
BANCO DE PORTUGAL v. WATERLOW & SONS, LD.
WATERLOW & SONS, LD. v. BANCO DE PORTUGAL.
Lord Macmillan.

date, for that was the date which the Bank itself fixed, and I think that it was proper to specify a time-limit for the presentation and exchange of the notes. In so far as the Bank voluntarily continued to honour notes presented after December 26 I am of opinion that it should not be allowed to lay the cost of doing so to the charge of Messrs. Waterlow.

The problem thus now narrows itself to the ascertainment of the loss which the Bank incurred by reason of its having honoured spurious 500 escudo notes of the Vasco da Gama type between December 7 and December 26, 1925.

In all 799,190 of the notes, including both the genuine and the spurious ones, were withdrawn from circulation. This figure includes those withdrawn after December 26. Of the 799,190 notes it has been ascertained that 209,718 or 26·241 per cent. were spurious. Up to December 26, the total number withdrawn was 791,533. If the percentage of 26·241 be applied to this figure the result is that between December 7 and December 26 207,706 may be taken as the number of spurious notes which the Bank honoured between these dates. Consequently the loss which the Bank is entitled to attribute to Messrs. Waterlow's breach of contract is the loss which it incurred by issuing good notes in exchange for 207,706 spurious notes. That is the measure in law of the liability of Messrs. Waterlow to the Bank.

The problem of assessing this loss necessitates an excursion into the controversial region of banking finance. What the Bank actually did was to give good and valid notes in exchange for entirely worthless notes. What loss did this occasion to the Bank? On the one hand it is submitted that all that the Bank lost was the negligible cost in paper and printing of the good notes which it gave in exchange for the spurious notes. On the other hand it is submitted that the Bank lost the full face value of these good notes so given in exchange.

Your Lordships were presented with a choice between these two extremes. No possible middle course was suggested. Which is right? If neither were held to be right the action would have to be dismissed, for neither evidence nor argument was adduced in support of any alternative other than the two I have stated.

The argument which was presented with admirable lucidity and much cogency by Mr. Gavin Simonds on behalf of Messrs. Waterlow and which prevailed with Scrutton L.J. in the Court of Appeal and has also prevailed with two of your Lordships, is certainly attractive. The Bank of Portugal, so runs the argument, is a bank of issue, that is to say, it can create and issue notes at its discretion up to the maximum which the law of Portugal, embodied in appropriate ordinances, permits. It costs the Bank nothing to create and issue its notes beyond the cost of the paper and printing. True, when the Bank issues one of its notes it incurs an obligation to the holder of it. But inasmuch as the paper currency of Portugal is not convertible, or, in other words, does not entitle the holder to claim payment of its face value from the Bank in gold at a fixed rate, the only obligation which the Bank incurs when it issues a note is to give on demand another note in exchange for it. Thus the Bank can always honour its obligation to the holders of its notes at the trivial cost of printing new notes. A promissory note which is perpetually renewable has theoretically no value, because it is never payable. The Bank has consequently only sacrificed some stationery.

In my opinion this argument is fallacious. It overlooks the cardinal fact that a note when issued by the Bank of Portugal becomes by the mere fact of its issue legal tender for the sum which it bears on its face. The issued note represents so much purchasing power in terms of commodities. It can be used by the holder of it to purchase at current prices any commodity in the market, including gold and securities. It can equally be used by the Bank to purchase commodities, including gold and securities, or to discharge debts due by it. It must be accepted by the Bank in discharge of debts due to it. All this is quite irrespective of the convertibility of the note. With all respect to the contrary view it is in my opinion quite an irrelevant circumstance for the present purpose that the holder of a Bank of Portugal note is not entitled to demand for it from the Bank a fixed amount of gold. Gold after all is only a medium of exchange. Its special importance as such arises from its universal acceptability and the stability of its value. A bank of issue which undertakes to pay its notes in gold undertakes to give in exchange for them a commodity of universally recognized value, and therefore a paper currency backed by gold possesses a high value in exchange; it is in effect as good as gold. On the other hand a paper currency which the bank issuing it does not undertake to pay in gold has necessarily a lower value in exchange; its purchasing power is not measurable in terms of a universally accepted standard, but depends on the credit of the issuing bank. In the present case the low value in exchange of the 500 escudo note of the Bank of Portugal reflects its inconvertibility; its purchasing power is correspondingly diminished. The Bank gets less value for the notes which it issues than it would get if they were convertible in gold.

In the course of the debate Mr. Simonds in answer to a question from me admitted that if the notes of the Bank had been payable in gold the liability of his clients would have been measurable in terms of their face value. This admission in my view was really inconsistent with his argument, which, whether it be well founded or not, seems to me to be unaffected by the convertibility or inconvertibility of the notes. Whether its notes are convertible or not a bank of issue in issuing them incurs only the cost of paper and printing; the difference consists in the purchasing power which they represent according as they are the equivalent of so much gold, i.e., of a universally acceptable medium of exchange, or only of so much of the bank's credit, a particular medium of exchange whose value may vary between being as good as gold or as worthless as dross. If the notes of the Bank of Portugal had been convertible the liability of Messrs. Waterlow would have been for the value of convertible notes, i.e., for notes of a higher exchange value, instead of for the value of inconvertible notes, i.e., for notes of a lower exchange value.

Much stress was laid by Messrs. Waterlow on the fact that in the Bank's own hands its notes were mere chattels possessing only the value of the paper and printing, and that if by a fire in its premises its whole stock of notes were burnt it would lose no more than their chattel value, whereas if the Bank's notes were destroyed by fire while in the possession of a member of the public a loss represented by their face value would be incurred. That is true, but the argument disregards again the value of the note-issuing power of the Bank, which enables it to confer on the paper which it issues the quality of legal tender, the quality of possessing purchasing power to the amount indicated on its face. The Bank only issues notes in exchange for value, and the value of its notes in turn reflects the value which it receives in exchange for them. Herein lies the answer to the point advanced on behalf of Messrs. Waterlow that, inasmuch as the Bank issues the bulk of its notes on the call of the Government on unremunerative terms, it cannot be said that the Bank if it had itself issued the spurious notes would necessarily have received full value for them; they might have been included in an unremunerative issue to the Government. The answer, it seems to me, is that the circumstance that a large number of its notes are issued to the Government in exchange for Government paper on unremunerative terms has for its result that the assets on which the paper currency of Portugal is based are by so much the less valuable as a basis of credit and that the currency has a correspondingly less value in exchange. Messrs. Waterlow get the benefit in the depreciated value of the escudos they have to pay.

It remains to notice an ingenious argument that the only effect of the increase in the currency of Portugal by the introduction of the spurious notes was to diminish the value of each unit of the currency and so to increase correspondingly the value in terms of that currency of all the assets in the country. Thus any loss occasioned to the Bank by the introduction of the spurious notes would be compensated by an equivalent appreciation of its assets. This is said to be the result of what is known as the quantity theory of money. I am not concerned to discuss the validity of this theory. I should doubt if it is applicable in the case of a surreptitious dose of excess notes and where, as here, the excess notes as soon as their existence was known were at once withdrawn; but in any case it is sufficient for the present purpose to point out that there is no evidence of any depreciation of the currency having occurred in consequence of the introduction of the spurious notes, and no evidence of the Bank having been compensated for issuing gratuitously over two hundred thousand of its notes by an equivalent appreciation of its assets. This argument, it may be remarked, would appear to be equally applicable in the case of a convertible currency.

On the whole matter accordingly I reach the conclusion that the Bank, being compelled to issue for nothing notes for which if it had issued them in ordinary course it would have received value corresponding to the purchasing power of the number of escudos which they represented, has suffered loss to the extent of the face value of these notes.

I now proceed to work out the practical result. The spurious notes honoured by the Bank between December 7 and 26 amounted to 207,706, which at 500 escudos each gives a total of 103,853,000 escudos, equivalent, at 96 escudos to the pound sterling, being the agreed current rate of exchange at the time, to 1,081,802*l.* To this must be added 6541*l.*, being the cost of the genuine notes rendered useless by their withdrawal from circulation, bringing out the total liability of Messrs. Waterlow at 1,088,343*l.* The Bank agreed that a claim of 2381*l.* which it had originally made for the cost of the good notes given in exchange for the spurious ones and which Wright J. took into account could not receive effect if the Bank was awarded the value of the spurious notes. For the sum of 1,088,343*l.* the Bank would accordingly be entitled to judgment were it not for the fact that it has already received from the liquidators of the Banco Angola e Metropole, the organization set up by the conspirators for the purpose of utilizing the spurious notes, a sum equivalent to 413,430*l.*, and have also estimated that they will receive from this source a further sum of 75,000*l.*, making in all 488,430*l.* A question has been raised as to the manner in which credit should be given for this sum. There are various ways in which it may be treated. (1.) It may simply be deducted from the sum of 1,088,343*l.* for which Messrs. Waterlow are liable, leaving 599,913*l.* as the sum for which judgment should be pronounced; (2.) inasmuch as the Bank's total loss (apart from the cost of printing notes) amounted to 1,092,281*l.*, being the sterling equivalent of 209,718 spurious notes, and as the 488,430*l.* represents a partial recovery against this sum, a proportion of the 488,430*l.* in the ratio of 207,706 (being the number of spurious notes in respect of which Messrs. Waterlow have been found liable) to 209,718 (being the total number of spurious notes honoured), or in other words 99·04 of the 488,430*l.* or 483,741*l.* should be deducted from the sum of 1,088,343*l.*, leaving 604,602*l.* as the sum for which judgment should be pronounced; or (3.) the sum of 488,430*l.* should be deducted from the Bank's total loss of 1,098,822*l.* (being the loss on 209,718 spurious notes plus the cost of genuine notes rendered useless) leaving 610,392*l.*, and as this sum is well within the total sum of 1,088,343*l.* for which Messrs. Waterlow are liable, judgment should be pronounced for 610,392*l.* Messrs. Waterlow contend for the first method, Wright J. adopted the second, and the Bank contend for the third, quoting in support *The Morgengry and The Blackcock.* (1) The differences in result are relatively unimportant in view of the magnitude of the sums involved and I have found the question a troublesome one, but I have come to the conclusion that the third method is the right one. Having recovered part of their total loss from the perpetrators of the fraud, and having established liability for more than the balance of their total loss against Messrs. Waterlow, the Bank is, in my view, entitled to avail themselves of Messrs. Waterlow's liability up to the extent of the balance of their total loss, and so to secure from the combined sources complete indemnity.

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(1) [1900] P. 1.

In parting from the case I cannot refrain from observing that the fact that a sum of nearly half a million pounds has been recovered by the Bank from the conspirators gives occasion for a comment on the leading contention of Messrs. Waterlow that the Bank lost nothing by issuing its good notes in exchange for spurious ones. The conspirators constituted themselves an illegal bank of issue for the spurious notes which cost them nothing but the cost of paper and printing, yet they seem to have made half a million sterling and probably much more by the issue of these notes. Why, it occurs to me to ask, should it be said that the Bank would not equally have received value in return if it had issued a corresponding number of genuine notes in ordinary course and that it has been deprived of nothing by having had to issue them gratuitously?

I am accordingly in favour of dismissing Messrs. Waterlow's appeal, allowing the Bank's appeal, and directing judgment to be pronounced against Messrs. Waterlow for the sum of 610,392*l.*

Order of the Court of Appeal reversed and judgment of Wright J. varied by increasing the sum of five hundred and sixty-nine thousand, four hundred and twenty-one pounds (569,421*l.*) *to six hundred and ten thousand, three hundred and ninety-two pounds* (610,392*l.*), *and subject to such variation restored. Appeal of Waterlow & Sons, Ld., dismissed. Waterlow & Sons, Ld., to pay to Banco de Portugal the costs in the Court of Appeal and also the costs of the appeals to this House. Banco de Portugal to pay to Waterlow & Sons, Ld., the costs of the petition for leave to adduce further evidence, such costs to be set off against the costs ordered to be paid by Waterlow and Sons, Ld., to Banco de Portugal. Cause remitted back to the King's Bench Division*

H. L. (E.)
1932
Banco de Portugal v. Waterlow & Sons, Ld.
Waterlow & Sons, Ld. v. Banco de Portugal.

to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 28, 1932.

Solicitors for Banco de Portugal: *Travers-Smith, Braithwaite & Co.*

Solicitors for Waterlow & Sons, Ld.: *Johnson, Jecks & Colclough.*

[PRIVY COUNCIL.]

J. C.*
1932
Feb. 9.

In re SILVER BROTHERS, LIMITED.

ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Interpretation of Statute—Crown—Crown Debts—Priority—Competing Dominion Tax and Provincial Tax—Legislative Power—Bankruptcy—Taxation—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *heads* 3, 21—*Interpretation Act* (*R. S. Can.*, 1906, *c.* 1), *s.* 16.

By s. 17 of the (Dominion) Special War Revenue Act, 1915, as amended in 1922 (but since repealed), liability to the Crown for the excise taxes thereby imposed was to rank for payment in priority to all other claims of whatsoever kind save administration expenses. By s. 1357 of the R. S. Queb., 1909, all sums due to the Crown in respect of Provincial taxes are to constitute a privileged debt ranking after law costs. By s. 16 of the Interpretation Act (R. S. Can., 1906, c. 1) no provision in any Act is to affect the Crown unless it is expressly stated therein that the Crown is to be bound thereby.

In a bankruptcy in the Province of Quebec the assets were insufficient to discharge both a sum due for tax under the Dominion statute above mentioned and a sum due for Provincial taxes.

Held, that it would have been competent to the Parliament of Canada under the British North America Act, 1867, s. 91, head 21 (bankruptcy), or head 3 (taxation), to enact the statute of 1915 so as to prejudice the rights of the Province, but that having regard to s. 16 of the Interpretation Act the statute had to be read as though it provided that the priority enacted should not operate so as to diminish any right of the Crown in any Province; the result was that the two debts would run pari passu as claimed by the Province.

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* *Present:* Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell of Killowen, and Sir Lancelot Sanderson.

There is only one Crown, but by legislation assented to by the Crown revenue and property vested in the Dominion are distinguished from revenue and property vested in a Province. There are two separate statutory purses; in each the ingathering and expending authority is different.

Att.-Gen. for Quebec v. *Nipissing Central Ry. Co.* [1926] A. C. 715 distinguished.

Judgment of the Supreme Court of Canada [1929] S. C. R. 557 reversed.

APPEAL (No. 135 of 1929) by special leave from a judgment of the Supreme Court of Canada (September 26, 1929), reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (June 28, 1927), which reversed a judgment of the Superior Court.

The appeal related to s. 17 of a Dominion statute of 1922 (12 & 13 Geo. 5, c. 47), amending the Special War Revenue Act, 1915 (5 Geo. 5, c. 8); since the present dispute arose the section had been repealed by 15 & 16 Geo. 5, c. 26, s. 9.

The proceedings arose in a bankruptcy in the Province of Quebec. The Dominion claimed that under s. 17 above mentioned, a debt due from the bankrupts for sales tax under the Act of 1915 was entitled to priority over a debt due for Provincial taxes, although by s. 1357 of R. S. Queb., 1906, sums so due were to constitute a privileged debt, ranking immediately after law costs. It was contended by the Province: (1.) that having regard to s. 16 of the Interpretation Act (R. S. Can., 1906, c. 1), the Act of 1915 did not give the Dominion the priority claimed; (2.) that if the Act of 1915 had that effect it was ultra vires under the British North America Act, 1867.

The terms of the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada (Anglin C.J. and Mignault, Newcombe, Lamont and Smith JJ.; Duff and Rinfret JJ. dissenting), reversing the Court of King's Bench for Quebec, held that the claim of the Dominion was entitled to priority over the claim of the Province. The appeal is reported at [1929] Can. S. C. R. 557.

1931. Dec. 8, 10, 11. *Geoffrion K.C.* and *Hon. Geoffrey Lawrence K.C.* (with them *Maurice Alexander*) for the appellant, the Attorney-General for Quebec. If the effect of s. 17 of the Dominion statute was to give a priority in respect of the Dominion tax, the provision was ultra vires under the British North America Act, 1867. The subject of the enactment was not within the Dominion power as to bankruptcy, though it touches bankruptcy incidentally. The subject was taxation, and was only ancillary to that head. Under s. 1357 of the R. S. Queb. the debt in respect of Provincial taxes had priority over other debts. That has been recognized by the Dominion legislature in s. 51, sub-s. 6, of the Bankruptcy Act. The Provincial power with regard to direct taxation is on an equal footing with the Dominion power of taxation. The principle whereby Dominion legislation overrides Provincial legislation applies only where the Dominion power is of a more particular nature than that invoked by the Province, and where the two enactments cannot exist side by side. *Royal Bank of Canada* v. *Larue* (1), and other decisions upon that principle, consequently are distinguishable. Further, it is well settled that the power of the Dominion to encroach upon Provincial legislative powers by legislation ancillary to the exercise of an enumerated power arises only if the legislation is necessary to the exercise of that power: *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia.* (2) The provision now in question was not necessary to the imposition of the tax. But even if it was competent to the Parliament of Canada to enact that debts due to the Crown in the right of the Dominion should have priority over debts due to the Crown in the right of the Provinces, s. 17 of the Act of 1915 cannot be so construed, having regard to s. 16 of the Interpretation Act. The words "all other claims" in s. 17 do not include a claim of the Crown in the right of the Province. Although the Crown is indivisible, its powers

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(1) [1928] A. C. 187.

(2) [1930] A. C. 111, 118.

J. C.
1932
SILVER BROTHERS, LD., *In re.*

and rights in Canada are administered by two separate bodies. The British North America Act, 1867, deals with the property and revenues of the Crown so as to distinguish between the Crown in the right of the Dominion and the Crown in the right of a Province. A mere inference from the terms of s. 17 that the legislature intended to enact a priority for the Dominion tax is not sufficient, because s. 16 of the Interpretation Act provides that the rights of the Crown are not to be affected "unless it is expressly stated" that the Crown is to be bound. The two debts should run pari passu. [Reference was made also to *Coomber* v. *Justices of Berkshire* (1) and *Rex* v. *Cook*. (2)]

Tilley K.C. and *Varcoe K.C.* for the respondent, the Attorney-General for Canada, being called upon only with regard to the question of interpretation. Sect. 16 of the Interpretation Act does not apply. There is only one Crown, and for the purposes of s. 16 the rights of the Crown cannot be split in the manner suggested. In *Att.-Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3) the Board, in construing the expression "Crown lands," held that no distinction could be drawn between the Dominion and Provincial Crown lands. Except for the suggested distinction s. 17 did not adversely affect the Crown; on the contrary it was advantageous to the Crown. Apart from s. 1357 there was no general priority for Crown debts in the Province of Quebec, which differed in that respect from Provinces where the law was based upon English law; the Civil Code had not that effect: *Exchange Bank of Canada* v. *The Queen*. (4) Further, the rights of the Crown are expressly dealt with. Sect. 17 states that the enactment is "notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law." It is conceded that those words do not include s. 16 of the Interpretation Act, but they included Provincial statutes—*Rex* v. *Canadian Northern Ry. Co.* (5)—with the result that it was expressly stated that the section was to have force notwithstanding s. 1357 of

(1) (1883) 9 App. Cas. 61.
(2) (1790) 3 T. R. 519.
(3) [1926] A. C. 715.
(4) (1886) 11 App. Cas. 157.
(5) [1923] A. C. 714, 716.

R. S. Queb. Moreover the Bankruptcy Act, 1919, s. 51, sub-s. 6 (now R. S. Can. 1927, c. 11, s. 125), had preserved priorities for taxes given by Provincial statutes, and certain priorities existed under s. 131 of the Bank Act (R. S. Can., 1927, c. 12); the effect of the express words of s. 17 was to sweep away all these priorities. If the appellant is right every Dominion statute should expressly state that it applies to Crown rights in case they are affected, but the decision in *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (1) shows that that is not necessary.

[*Hon. Geoffrey Lawrence K.C.* The Customs Acts under which the tax was imposed in that case expressly gave power to tax Crown property in a Province.]

Sect. 16 of the Interpretation Act should not be applied so that s. 17 of the Act of 1915 operates differently in different Provinces: *Minister of Finance* v. *Smith.* (2)

Geoffrion K.C. replied.

1932. Feb. 9. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is an appeal from a judgment of the Supreme Court of Canada pronounced on September 26, 1929, allowing an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, dated June 28, 1927.

On December 31, 1923, an order of the Superior Court of the Province of Quebec was made, declaring Messrs. Silver Brothers, Ld., bankrupt.

The Government of the Dominion of Canada duly filed with the trustee in bankruptcy a claim in the sum of $3707.07 for sales tax imposed in virtue of the Special War Revenue Act, 1915, the said tax having become due subsequent to June 28, 1922, the date on which a certain amendment to the Special War Revenue Act—namely, 12 & 13 Geo. 5, c. 47, came into force.

The Government of the Province of Quebec also duly filed with the trustee a claim in the sum of $527.42 for taxes due

(1) [1924] A. C. 222.

(2) [1927] A. C. 193, 197.

by the debtor for the years 1921, 1922 and 1923 under the provisions of art. 1345 et seq. of the Revised Statutes of Quebec, 1909, imposing a tax on commercial corporations.

The moneys realized from the sale of the assets of the insolvent estate, after the payment of costs and expenses of the trustee, amounted to $2353.51, a sum insufficient to pay the two claims aforesaid.

The trustee in his final dividend sheet treated the claim of the Dominion as privileged, according to it the sum of $2353.51 aforesaid in priority to the claim of the Province, and paid over to the Dominion $2000 out of this sum.

The Attorney-General for Quebec filed in the Superior Court a petition disputing the dividend sheet and claiming that the debt due to the Province was privileged as a result of art. 1357 of the Revised Statutes of Quebec, 1909, that the claim of the Dominion was not privileged, and that s. 17 of the Special War Revenue Act as enacted by 12 & 13 Geo. 5, 1922, c. 47, was ultra vires, or that if the said section was intra vires that the claims of the respective Governments were equally privileged and should be paid concurrently.

Sect. 17 of the Special War Revenue Act aforesaid provides as follows: "Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation, for the payment of the excise taxes specified in the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets." This provision came into force on June 28, 1922, and remained in force until July 1, 1925, when it was repealed by 15 & 16 Geo. 5, c. 26, s. 9.

Art. 1357 of the Revised Statutes of Quebec aforesaid provides as follows: "All sums due to the Crown in virtue of this section shall constitute a privileged debt, ranking immediately after law costs." It came into force in 1906 (6 Edw. 7, Queb., c. 10).

The petition of the Attorney-General for Quebec was dismissed by Panneton J. on December 3, 1925, on the ground that s. 17 of the Special War Revenue Act aforesaid accorded to the Dominion claim a priority over that of the Province.

The Attorney-General for Quebec appealed to the Court of King's Bench (Appeal Side), which Court (Guerin J. dissenting) on June 28, 1927, set aside the judgment of Panneton J. and ordered that the claims of the two Governments should be treated in the dividend sheet as of the same rank and concurrently.

The Court further recommended that the Government of Canada should repay to the trustee whatever sum that would be required to make up the share of the Province of Quebec according to the revised dividend sheet.

The Attorney-General for Canada thereupon appealed to the Supreme Court of Canada and, on September 26, 1929, the Court, consisting of Anglin C.J. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ., allowed the appeal (Duff and Rinfret JJ. dissenting), and set aside the judgment of the Court of King's Bench and restored the judgment of Panneton J.

The appeal before their Lordships was argued upon two grounds. The first, and it is this which bulks almost exclusively in the judgments of the Courts below, was that on the proper construction of the well known ss. 91 and 92 of the British North America Act the Dominion had no power to enact the s. 17 above quoted so as to prejudice the rights of the Government of the Province of Quebec. As to that question their Lordships have no hesitation in preferring the views of the majority of the judges of the Supreme Court.

It would be of no service to go over again the familiar ground of what may be called the competing claims of the two sections and to re-state what has been so often stated. As lately as 1929, in the case of *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia* (1), Lord Tomlin,

(1) [1930] A. C. 111, 118.

delivering the judgment of the Board, laid down four propositions regarding the conflict of Dominion and Provincial jurisdiction in terms which need not here at length be repeated. Now, looking at s. 17 and the way it speaks of the preference, it would not be difficult to hold that it was a rule only applicable in bankruptcy. If that is so, then the matter is ended, for bankruptcy is head 21 of s. 91. But let it be assumed that it is rather a natural concomitant of taxation, then the case falls clearly under the fourth proposition laid down in the judgment delivered by Lord Tomlin; it runs thus: "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail." As a matter of fact, this is the textual reproduction of what had been said by Lord Dunedin as long ago as 1907 in the case of the *Grand Trunk Ry. of Canada* v. *Att.-Gen. of Canada.* (1) Now here, so far as taxation itself is concerned, the field is clear. The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash; consequently the Dominion must prevail.

There was, however, another ground of appeal clearly raised by the reasons of appeal and strenuously insisted upon before their Lordships, and that is based on the effect of s. 16 of the Interpretation Act, 1906, a Dominion Act. That section reads as follows: "16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

Relying on that section, counsel for the Province says: Here is a debt due to His Majesty in Quebec. That debt is an asset of His Majesty, to be applied in Quebec for the purposes of Quebec according to the advice of the Quebec

(1) [1907] A. C. 65.

ministers. If the claim of the Dominion is upheld the money to satisfy this debt is swept away into the coffers of the Dominion. Therefore by this statute His Majesty is being bound to the detriment of one of his rights, and there is no express statement in the statute that His Majesty is to be so bound.

Unfortunately, this aspect of the case received but scant consideration in the judgments of the Courts below. It is not that it was overlooked. It was clearly stated in the factum for the Province. Duff J., one of the dissenting judges, says: "The Crown is not mentioned and the result of what I have just said, having regard to the provisions of the Interpretation Act, is that other pecuniary claims of the Crown" (by which he obviously means other than those created by the Dominion statute itself) "are not prejudiced by the priority declared by s. 17." The other dissenting judge, Rinfret J., says: "Mais l'intention de donner à la taxe fédérale précéance sur la taxe provinciale ne résulte pas nécessairement du texte de l'article 17 de Special War Revenue Act, 1915. L'intention 'd'y atteindre Sa Majesté' n'y est pas 'formellement exprimée' (Loi d'interprétation—S. R. C. 1906—ch. 1, s. 16). Il est à présumer que le législateur fédéral a voulu que sa loi sur the Special War Revenue fût comprise conformément à cette prescription de sa propre loi d'interprétation. Il en résulterait que l'art. 17 du Special War Revenue Act, 1915, ne porte pas 'atteinte aux droits de Sa Majesté' représentée par la Province de Québec, tels qu'ils sont exprimés dans l'article 1357 des Statuts Revisés de Québec, 1909, et que chaque législation doit recevoir son plein effet."

But assuredly the learned judges who formed the majority did not deal with the argument in the serious way which it demanded if the plea were to be repelled. The same cannot be said of the argument before their Lordships, for Mr. Tilley for the Dominion strove most manfully against the conclusion which was sought to be forced upon him. Their Lordships will deal with some at least of his contentions.

His first point had been stated by the learned Chief Justice. Inasmuch as the section says that it is to apply notwithstanding the provisions of the Bank Act and the Bankruptcy Act or "any other statute or law," he says it escapes the provision of the Interpretation Act. Now, first of all, the Interpretation Act is a general Act meant to apply to all future as well as to all present legislation, and their Lordships doubt whether it could be excluded except by special reference. But, apart from that, the Bank Act and the Bankruptcy Act both deal with preferences, and that is the reason why they are particularly mentioned; and it follows that "any other statute or law" must be ejusdem generis; that is to say, dealing with preferences. Their Lordships have accordingly no difficulty in rejecting this contention. It is, perhaps, right here to mention the method in which the learned trial judge got rid of the effect of s. 16, though it was not adopted by any of the judges who formed the majority in the Supreme Court. He says that s. 17 is in a later statute than s. 16, and, therefore, in view of the maxim "posteriora prioribus derogant," s. 16 must give way. But this entirely misses the point that the maxim only applies when the two statutes cannot live together. There is no difficulty in the statute that enacts s. 17 living with the Interpretation Act. The clause of the Interpretation Act is, so to speak, written into every statute. Thus the later statute gives perfectly good priority against all and sundry, but says that this priority does not affect the Crown right in the Province.

Next it was said that inasmuch as the Bank Act and Bankruptcy Act not only dealt with preferences, but (inter alia) with Crown preferences, there is an "irresistible implication" that the Act was meant to deal with all Crown preferences. The simple answer to this is to fix one's eyes on s. 16, and it becomes apparent that it is a contradiction in terms to hold that an express statement can be found in an "irresistible implication."

The next point made was that the provisions of s. 16 do not apply when what is being done is not to affect the Crown prejudicially, but to give a benefit to the Crown, and along with this it is urged that there is only one Crown, and reference is made to the case of *Att.-Gen. for Quebec* v. *Nipissing*

Central Ry. Co. (1) It is quite true that the section refers to cases where the Crown would be "bound," i.e., subjected to liability, and not to those where the Crown is benefited. But the fallacy lies in the application of this truth to the case in question. Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different. The case above referred to is quite on all fours with this doctrine. What was decided there was that when a statute, which ex hypothesi is intra vires, had said that a railway with consent of the Governor-General could on paying compensation take Crown lands, that meant Crown lands in the Province as well as in the Dominion. It will be at once observed that the point raised here could not be raised there. There was no doubt as to the mention of the Crown, and the only question was one of interpretation. Did the term "Crown lands" mean Crown lands everywhere or only in the Dominion? There was no reason for limiting the interpretation. Crown lands in the Province were just as much Crown lands as Crown lands in the Dominion. The Crown in the Province was not prejudiced. The compensation money would be paid to the Provincial exchequer except in the cases where there was a special purpose or trust under which the lands were vested in the Crown, and in that case there was a special direction under sub-s. 4.

Upon the whole matter, therefore, their Lordships think that the plea of the appellant is good. The effect of s. 16 is, so to speak, to add to the words of s. 17, "but this priority shall not operate against any right in the Crown in a Province, where such right would be diminished by the priority being

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(1) [1926] A. C. 715.

J. C.
1932
SILVER BROTHERS, LD., *In re.*

asserted against it." Whether the strict result of this view should be to give to the Province an overriding priority need not be discussed. Counsel for the Province did not ask for such relief; he was content that the two debts should rank pari passu.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, recall the judgment of the Supreme Court, and revert to the judgment of the Court of King's Bench, except so far as it provides for the payment of costs.

As regards costs, although the decisive factor here has been the Interpretation Act, the judgments of the Courts below turned on a consideration of the respective legislative powers of Dominion and Province under the British North America Act. Their Lordships are of opinion that in these circumstances there ought to be no costs awarded as between the Dominion and the Province of the proceedings in any of the Courts in Canada or here, and that any costs already paid under any previous order should be repaid.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1932
May 21.

ATTORNEY - GENERAL FOR NEW SOUTH WALES AND OTHERS . . . APPELLANTS;

AND

TRETHOWAN AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Constitution—Abolition of Legislative Council—Act requiring Referendum—Act not to be repealed without Referendum—Powers of Legislature of State—" Manner and Form "—Constitution Act, 1902 (*No.* 32 *of* 1902—*No.* 28 *of* 1929; *N.S.W.*), *s.* 7A—*Colonial Laws Validity Act,* 1865 (28 *&* 29 *Vict. c.* 63), *s.* 5.

The Constitution Act, 1902, enacted by the legislature of New South Wales, was amended in 1929 by adding s. 7A, which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission to them made in accordance with the section; and that the same provision was to apply to a Bill to repeal the section. In 1930 both houses of the legislature passed two Bills, one to repeal s. 7A and the other to abolish the Legislative Council.

By s. 5 of the Colonial Laws Validity Act, 1865, the legislature of the State had full power to make laws respecting the constitution, powers and procedure of the legislature, provided that the laws should have been passed in such " manner and form " as might from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law in force in the colony:—

Held, that the whole of s. 7A of the Constitution Act, 1902, was within the competence of the legislature of the State under s. 5 of the Colonial Laws Validity Act, 1865, that the provision that Bills of the nature stated must be approved by the electors before being presented was a provision as to " manner and form " within the meaning of the proviso; and accordingly that the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors voting.

Judgment of the High Court of Australia, 44 C. L. R. 394, affirmed.

APPEAL (No. 68 of 1931) by special leave from a judgment of the High Court of Australia (March 16, 1931) affirming a judgment of the Supreme Court of New South Wales (December 23, 1930).

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD HANWORTH M.R., LORD ATKIN, and LORD RUSSELL OF KILLOWEN.

The Constitution Act, 1902 (No. 32 of 1902; N. S. W.), enacted by the legislature of New South Wales consolidating and amending the constitution of that State, was amended by the Constitution (Legislative Council) Amendment Act, 1929 (No. 28 of 1929; N. S. W.), by the insertion of s. 7A. That section provided, shortly stated, that no Bill to abolish the Legislative Council should be presented to the Governor for His Majesty's assent until it had been approved by a majority of the electors voting upon a submission to them in accordance with the section; further (by sub-s. 6) that the same provision was to apply to any Bill for the repeal or amendment of the section.

In 1930 both houses of the legislature passed two Bills, one repealing s. 7A above referred to, and the other abolishing the Legislative Council. Neither of the two Bills had been approved in accordance with s. 7A.

Sect. 7A, and the provisions of the New South Wales Constitution Act, 1855 (18 & 19 Vict. c. 54), and the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), material to powers of the legislature of the State, are set out in the judgment of the Judicial Committee.

On December 10, 1930, the first two respondents, members of the Legislative Council suing on behalf of themselves and all other members who were not defendants, brought a suit in the Supreme Court of New South Wales (in Equity) against the present appellants and the respondent Sir John Peden, the President of the Legislative Council, claiming a declaration that the two Bills could not lawfully be presented to the Governor for assent until approved by the electors in accordance with s. 7A of the Constitution Act, 1902, as amended, and for injunctions restraining the presentation of the Bills.

Upon an ex parte motion interim injunctions were granted, and the matter was adjourned for hearing by the full Court.

Upon the hearing of the motion, it was demurred to by the defendants upon the grounds (1.) that s. 7A, sub-s. 6, of the Constitution Act, 1902, was invalid; (2.) that no facts were alleged which gave the plaintiffs any ground for equitable relief; (3.) that having regard to the object of the suit it was not competent.

The full Court (Street C.J. and Ferguson, James and Owen JJ.; Long Innes J. dissenting) overruled the demurrers, and granted the declaration and injunctions prayed. The proceedings are reported at 31 S. R. (N. S. W.) 183.

The present appellants obtained leave to appeal to the High Court of Australia; the appeal was limited by the order to the questions " whether the Parliament of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal s. 7A of the Constitution Act, 1902, except in the manner provided by the said s. 7A."

The High Court of Australia (Rich, Starke, and Dixon JJ.; Gavan Duffy C.J. and McTiernan J. dissenting) dismissed the appeal. The appeal is reported at 44 C. L. R. 394.

The grant of special leave to appeal to His Majesty in Council was limited to the questions above mentioned as being the subject of the appeal to the High Court of Australia.

1932. April 12, 14, 15, 18, 19, 21, 22, 25. *Sir Stafford Cripps K.C.* and *Pritt K.C.* (with them *A. C. Nesbitt*) for the appellants. The legislature of New South Wales had power to repeal s. 7A, added in 1929 to the Constitution Act, 1902, without a reference to the electors, although sub-s. 6 purported to require that there should be a reference. The sub-section was void and inoperative under s. 2 of the Colonial Laws Validity Act, 1865, as it was repugnant to the powers conferred on the legislature of the State by s. 4 of the New South Wales Constitution Act, 1855, and s. 5 of the Colonial Laws Validity Act, 1865. The legislative powers so conferred were plenary powers and, within the limits prescribed, of the same force and nature as the powers of the Imperial legislature itself: *Reg.* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Powell* v. *Apollo Candle Co.* (3) It is said that the full power which the State legislature had by s. 4 of the Act of 1855 to alter or repeal

(1) (1878) 3 App. Cas. 889, 904.

(2) (1883) 9 App. Cas. 117, 132.

(3) (1885) 10 App. Cas. 282, 285.

the provisions of its constitution was exhausted when a new constitution was enacted by the State legislature in 1902, and that s. 7A, sub-s. 6, was a provision as to "manner and form" within the proviso to s. 5 of the Act of 1865. The appellants dispute both these propositions. The terms of s. 4 of the Act of 1855, and the definition of "legislature" in s. 9, indicate that the powers then conferred were to apply to any substituted constitution. The Act of 1855 specifically dealt with New South Wales; the Act of 1865 was general to colonial legislatures and did not in terms limit the powers conferred in 1855. As stated in *McCawley* v. *The King* (1) the Act of 1865 was "explanatory legislation." The powers granted in 1855 could exist side by side with the powers granted in 1865: *Taylor* v. *Att.-Gen. of Queensland.* (2) The words "manner and form" in the proviso to s. 5 of the Act of 1865 therefore should not be given an effect which would diminish or fetter the powers granted by s. 4 of the Act of 1855 and confirmed by the substantive provision of s. 5 of the Act of 1865. By s. 7A, sub-s. 6, enacted in 1929, the legislature purported to "abdicate" part of the powers granted by the Imperial parliament, and the provision was consequently void for repugnancy: see dissenting judgment of Isaacs and Rich JJ. in *McCawley* v. *The King* (3) approved by the Privy Council upon appeal. (4) The words "manner and form" refer only to matters of procedure internal to the legislature itself; that view is supported by the use of the word "passed" not the word "made" or "enacted." The words do not include a provision making the volition of the legislature subject to the veto of a body outside the legislature. Sect. 7A cannot be regarded as making the electors part of the legislature; the definition of "legislature" in s. 1 of the Act of 1865 is not consistent with there being more than one legislature, however composed, for every kind of legislation. Further, it is a well settled principle of the constitution of the United Kingdom that parliament cannot bind its successors. That principle having been attributed to the sovereign power

(1) [1920] A. C. 691, 709.
(2) (1917) 23 C. L. R. 457, 475, 476.
(3) (1918) 26 C. L. R. 9, 57, 64.
(4) [1920] A. C. 691, 714.

of the legislature (Dicey's Law of the Constitution, 8th ed., p. 62) was held to be inapplicable. Having regard, however, to the force and nature of the legislative powers of the State, as appearing from *Reg.* v. *Burah* (1), and the other cases already referred to, it is submitted that the principle applies in this case. The plenary powers which enabled the legislature of the State in 1929 to enact s. 7A enabled it in 1930 to repeal the section, and any fetter purporting to be placed upon the exercise of that power was inoperative.

W. A. Greene K.C. and *Maughan K.C.* (with them *Wilfrid Barton* and *Baillieu*) for the plaintiff-respondents. The argument for the appellants in reality is not for maintaining but for cutting down the legislative powers of a self-governing State. The question is whether s. 7A of the Act of 1902 was intra vires the legislature; no question of repugnancy arises. Under Imperial legislation the legislature of New South Wales had the same power to make laws altering the constitution of the State as to make other laws; that is to say the constitution was "flexible" not "rigid." The power of the State legislature in 1929 was derived immediately from the Constitution Act, 1902, the validity of which is undoubted. Sect. 7 of that Act specifically authorized the making of laws "concerning the Legislative Council." By s. 5 of the Colonial Laws Validity Act, 1865, the legislature had "full power to make laws respecting the constitution, powers and procedure of such legislature." Sect. 7A altered the constitution of the legislature by making the electors upon a referendum an integral element of it. They became part of the "authority competent to make laws" within the definition of "legislature" in s. 1 of the Act of 1865; that definition makes no reference to "house" or "houses." The legislative part played by a referendum is recognized in Bryce's American Constitution, 1912 ed., p. 467. If s. 7A did not alter the constitution of the legislature it altered its powers by imposing a condition to their exercise in relation to a specified matter; that was equally within s. 5 of the Act of 1865. Even if s. 7A, sub-s. 6, is not to be regarded as a valid alteration of

(1) (1878) 3 App. Cas. 889, 904.

J. C.
1932

ATTORNEY-GENERAL FOR NEW SOUTH WALES
v.
TRETHOWAN.

the constitution or powers of the legislature it was a provision as to "manner and form" within the proviso to s. 5 of the Act of 1865, and the observance of its provisions was necessary therefore to a repeal of the section. The Act of 1855 does not affect that question. When the constitution to which it related was repealed by the Act of 1902 its operative effect was exhausted. Even if the Act is still operative at all, it must be read subject to the explanation afforded by s. 5 of the Act of 1865. The words "manner and form" in the proviso are not limited to matters of internal procedure such as are contained in standing orders; the words which follow are not consistent with that view. The section closely follows the language of 26 & 27 Vict. c. 84, s. 2, which uses the words "formalities and conditions." The word "passed" in the proviso is used, as it frequently is, as equivalent to "enacted": e.g., 26 & 27 Vict. c. 84, preamble, and s. 2; see also Todd's Parliament Government in the Colonies, 1894, p. 688. Every provision as to "manner and form" necessarily fetters the power of the legislature. The proviso relates to the whole process of turning a proposed law into a legislative enactment, and requires the fulfilment of every condition imposed by existing legislation. It applies to a law as to "manner and form" equally with any other law: *Taylor* v. *Att.-Gen. of Queensland.* (1) A referendum, either as a step in legislation or as a "manner and form" of enacting a law, was no innovation in Australia. Provision had been made for it in statutes of the various States enabling federation, and in s. 128 of the Federal constitution (which refers to it as the "manner" of altering the constitution); also in other State enactments. The exercise of legislative powers in a particular matter not infrequently has been made subject to a condition the performance of which is outside the power of the legislature itself: e.g., 9 Geo. 4, c. 83, s. 22; 15 & 16 Vict. c. 72, s. 78; 24 & 25 Vict. c. 67, s. 29. The judgment of the Board in *McCawley* v. *The King* (2) recognized that under s. 5 of the Act of 1865 a flexible constitution could by appropriate legislation be made rigid pro tanto. The constitutional principle that parliament cannot bind its successor has never been applied to a legislature which has not sovereign but derived powers. Where a legislature of that kind purports to pass an Act having that effect, the validity of the Act depends upon the statutory powers under which it operates, not upon general principle. The object of the Colonial Laws Validity Act, 1865, was to enable representative legislatures overseas to make constitutional alterations without invoking the aid of the Imperial parliament; if s. 7A of the Act of 1902 is invalid there is a hiatus in the powers intended to be given. [Reference was made also to Jenkyns' British Rule and Jurisdiction Beyond the Seas, p. 75; Keith's Imperial Unity and the Dominions, pp. 389, 390; Keith's Sovereignty of the British Dominions, pp. 46, 47; Anson, Law Quarterly Review, vol. ii., pp. 427, 435.]

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(1) 23 C. L. R. 457, 479.

(2) [1920] A. C. 691.

Latham K.C., Attorney-General for Australia (with him *Fullager*), intervener, supported the validity of s. 7A, including sub-s. 6, of the Constitution Act, 1902.

Sir Thomas Inskip A.-G. (with him *Wilfrid Lewis*), intervener, also supported the validity of that enactment; he deprecated the State invoking the aid of the Imperial parliament.

Pritt K.C. in reply. Sect. 7A of the Constitution Act, 1902, did not make the electors part of the legislature. If it did so a variety of legislatures could be created in the State each for a particular class of matter. The contention is inconsistent with the judgment of the Board *In re Initiative and Referendum Act* (1), as well as with the definition of legislature in s. 2 of the Act of 1865. Although the legislature could alter its powers, it could not abrogate them, wholly or in part. It is true that every provision as to "manner and form" fetters pro tanto the legislative powers, but there is a vital distinction between a provision as to the mode in which the legislature must exercise its power and a provision which deprives it of power to give effect to its intention unless an extraneous body approves.

(1) [1919] A. C. 935.

May 31. The judgment of their Lordships was delivered by

Lord Sankey L.C. This is an appeal by special leave from a judgment of the High Court of Australia, dated March 16, 1931, affirming by a majority of three judges to two (Rich, Starke and Dixon JJ. on the one hand; Gavan Duffy C.J. and McTiernan J. dissenting) a decree made by the Supreme Court of New South Wales, dated December 23, 1930, whereby it was declared that a Bill to abolish the Legislative Council, or to repeal or amend the provisions of s. 7A of the Constitution Act, 1902, could not be presented to His Excellency the Governor for the Royal assent until approved by the electors in accordance with that section, and whereby several injunctions were granted to restrain the presentation of two Bills framed and designed to effect the above purposes until the same had respectively been approved by the electors in accordance with the said section.

The plaintiffs in the action are members of the Legislative Council of New South Wales, and have sued upon behalf of themselves and all other the members of the Legislative Council who are not defendants. The defendants in the action, other than Sir John Beverley Peden, are the Ministers of the Crown of New South Wales. The said Sir John Beverley Peden is the President of the Legislative Council, and was a defendant in the action and is a respondent on appeal.

The Attorney-General for England and the Attorney-General for the Commonwealth obtained leave to intervene, and their Lordships had the advantage of hearing their arguments.

The question to be determined is in substance whether the legislature of the State of New South Wales has power to abolish the Legislative Council of the State or to alter its constitution or powers without first taking a referendum of the electors upon the matter. This question depends upon the true construction and effect of certain statutes, both Imperial and local, and, before dealing with it, it is necessary for the sake of clearness to set out such portions of the said statutes as are material to the present matter.

The history of the legislation is concisely set out in the judgment of Dixon J. In 1853 the then Legislative Council of New South Wales, purporting to exercise a power which it possessed to establish in its stead a bicameral parliament and to confer upon it the powers and functions of that Council, passed a Bill for a Constitution Act which was reserved for the Queen's assent. That Bill contained provisions which it was beyond the powers of the Council to enact, and provisions which the Imperial authorities thought should be omitted. In 1855, an Imperial Act (18 & 19 Vict. c. 54) (1), called in New South Wales, "The Constitution Statute," was therefore passed for the purpose of enabling Her Majesty the Queen to assent to the Bill so reserved as amended by the hands of the Imperial authorities.

The Constitution Statute itself contained, amongst others, the two following sections :—

"Section 4.—It shall be lawful for the legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said colony, subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said legislature.

"Section 9.—In the construction of this Act the term 'Governor' shall mean the person for the time being lawfully administering the government of New South Wales; and the word 'legislature' shall include as well the legislature to be constituted under the said reserved Bill and this Act, as any future legislature which may be established in the said colony under the powers in the said reserved Bill and this Act contained."

The Bill so amended was annexed in a schedule to the Constitution Statute, and in that statute was described as "the said reserved Bill," but it was known for many years in New South Wales as the "Constitution Act." It empowered the new legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, and expressly authorized it, subject to the conditions as to majorities contained in s. 36, to alter the constitution of the second chamber. From this date, therefore, the parliament of New South Wales consisted of two chambers—a Legislative Council and a Legislative Assembly—and within the colony Her Majesty had power by and with the advice and consent of the said Council and Assembly to make such laws.

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(1) The Short Titles Act, 1896, assigns the statute the title "the New South Wales Constitution Act, 1855."

By an Act in 1857 (20 Vict. No. 10) the New South Wales legislature repealed s. 36, which prescribed the majorities necessary for such alteration of the Constitution as was therein mentioned, and that Act, after being reserved for Her Majesty, received the Royal assent.

By the Colonial Laws Validity Act, 1865, which applied generally to the colonies, and therefore to New South Wales, " a representative legislature " was defined as follows: " representative legislature shall signify any colonial legislature which shall comprise a legislative body of which one-half are elected by inhabitants of the colony." The legislature of New South Wales has always been a representative legislature within this definition. Sects. 5 and 6 of the Act are as follows :—

" Section 5.—Every colonial legislature shall have and be deemed at all times to have had full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein ; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature ; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act✓ of parliament, letters patent, Order in Council, or colonial law, for the time being in force in the said colony.

" Section 6.—The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any Bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be prima facie evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper in the colony to which such law or Bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved Bill as aforesaid, shall be prima facie evidence of such disallowance or assent."

In the year 1902, New South Wales, by an Act, No. 32 of that year, altered its constitution, and its new constitution was defined by the new Act. "The legislature" was defined as meaning "His Majesty the King, with the advice and consent of the Legislative Council and Legislative Assembly." The powers of the legislature were set out in s. 5 of the Act, and such portion of the Constitution Act of 1855 as still remained was repealed.

It should be stated here, although perhaps rather interrupting the narrative, that it was contended on behalf of the present respondents that the effect of the 1902 Act repealing the Constitution Act of 1855 was entirely to put an end to the 1855 Act, and that therefore the purposes of s. 4 of the Constitution Statute of the same year became exhausted.

In 1929 the New South Wales Legislature enacted (Act No. 28 of that year) a new Constitution Act which subsequently received the assent of His Majesty, and is known as the Constitution (Legislative Council) Amendment Act, 1929 (New South Wales). Sect. 2 is as follows:—

"The Constitution Act, 1902, as amended by subsequent Acts, is amended by inserting next after s. 7 the following new section:—

7A.—(1.) The Legislative Council shall not be abolished nor, subject to the provisions of sub-s. 6 of this section, shall its constitution or powers be altered except in the manner provided in this section. (2.) A Bill for any purpose within sub-s. 1 of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3.) On a day not sooner than two months after the passage of the Bill through both houses of the legislature, the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the legislature. (4.) When the Bill is submitted to the electors the vote shall be taken in such manner as the legislature prescribes. (5.) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6.) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, ss. 13, 14, 15, 18, 19, 20, 21 and 22."

Towards the end of 1930 the Government then in power were anxious to get rid of this legislation, and they promoted two Bills for this object, both of which passed both houses of the legislature. The first Bill enacted that s. 7A above referred to was repealed, and the second Bill enacted by clause 2, sub-s. 1: "The Legislative Council of New South Wales is abolished."

It is in respect of these two Bills that an injunction was granted restraining them from being presented to the Governor-General until they had been submitted to the electors and a majority of the electors voting had approved them.

It is now possible to state the contentions on either side.

The appellants urge: (1.) That the King, with the advice and consent of the Legislative Council and the Legislative Assembly, had full power to enact a Bill repealing s. 7A.

(2.) That sub-s. 6 of s. 7A of the Constitution Act is void, because: (*a*) The New South Wales legislature has no power to shackle or control its successors, the New South Wales constitution being in substance an uncontrolled constitution; (*b*) It is repugnant to s. 4 of the Constitution Statute of 1855;

(c) It is repugnant to s. 5 of the Colonial Laws Validity Act, 1865.

For the respondents it was contended: (1.) That s. 7A was a valid amendment of the constitution of New South Wales, validly enacted in the manner prescribed, and was legally binding in New South Wales.

(2.) That the legislature of New South Wales was given by Imperial statutes plenary power to alter the constitution, powers and procedure of such legislature.

(3.) That when once the legislature had altered either the constitution or powers and procedure, then the constitution and powers and procedure as they previously existed ceased to exist, and were replaced by the new constitution and powers.

(4.) That the only possible limitations of this plenary power were: (a) it must be exercised according to the manner and form prescribed by any Imperial or colonial law, and (b) the legislature must continue a representative legislature according to the definition of the Colonial Laws Validity Act, 1865.

(5.) That the addition of s. 7A to the Constitution had the effect of: (a) making the legislative body consist thereafter of the King, the Legislative Council, the Assembly and the people for the purpose of the constitutional enactments therein described, or (b) imposing a manner and form of legislation in reference to these constitutional enactments which thereafter became binding on the legislature by virtue of the Colonial Laws Validity Act, 1865, until repealed in the manner and mode prescribed.

(6.) That the power of altering the constitution conferred by s. 4 of the Constitution Statute, 1855, must be read subject to the Colonial Laws Validity Act, 1865, and that in particular the limitation as to manner and form prescribed by the 1865 Act must be governed by subsequent amendments to the constitution, whether purporting to be made in the earlier Act or not.

Such are the facts and such the contentions of the parties.

It is obvious that these varying contentions overlap and impinge upon one another, and, indeed, each party claimed to be the protector of the rights and powers of the parliament of New South Wales, and asserted that it was his opponent who was seeking to fetter or restrict them. Many hypothetical cases were put before their Lordships, and the Board were invited to express an opinion upon many different situations which might arise, but they do not conceive it to be their duty to go outside the point involved in the case, which is really a short one—namely, whether the legislature of the State of New South Wales has power to abolish the Legislative Council of the said State, or to repeal s. 7A of the Constitution Act, 1902, except in the manner provided by the said s. 7A. It will be sufficient for this Board to decide any other question if, and when, it arises.

The answer depends in their Lordships' view entirely upon a consideration of the meaning and effect of s. 5 of the Act of 1865, read in conjunction with s. 4 of the Constitution Statute, assuming that latter section still to possess some operative effect. Whatever operative effect it may still possess must, however, be governed by and be subject to such conditions as are to be found in s. 5 of the Act of 1865 in regard to the particular kind of laws within the purview of that section. Sect. 5 is therefore the master section to consider for the purpose here in hand. It will be observed that the second sentence of the section contains an enacting part with a proviso, and it was vehemently contended by the appellants that the effect of the proviso was not to cut down the operative part of the sentence, and that any construction of the words "manner and form," which are contained in the proviso, which cut down the powers previously granted was repugnant to the power so granted. In their Lordships' opinion it is impossible to read the section as if it were contained in watertight compartments. It must be read as a whole, and read as a whole the effect of the proviso is to qualify the words which immediately precede it. The powers are granted sub modo. Reading the section as a whole, it gives to the legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed

J. C.
1932
ATTORNEY-GENERAL FOR NEW SOUTH WALES
v.
TRETHOWAN.

in such manner and form as may from time to time be required by any Act still on the statute book. Beyond that, the words "manner and form" are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent.

In their Lordships' opinion the legislature of New South Wales had power under s. 5 of the Act of 1865 to enact the Constitution (Legislative Council) Amendment Act, 1929, and thereby to introduce s. 7A into the Constitution Act, 1902. In other words, the legislature had power to alter the constitution of New South Wales by enacting that Bills relating to specified kind or kinds of legislation (e.g., abolishing the Legislative Council or altering its constitution or powers, or repealing or amending that enactment) should not be presented for the Royal assent until approved by the electors in a prescribed manner. There is here no question of repugnancy. The enactment of the Act of 1929 was simply an exercise by the legislature of New South Wales of its power (adopting the words of s. 5 of the Act of 1865) to make laws respecting the constitution, powers and procedure of the authority competent to make the laws for New South Wales.

The whole of s. 7A was competently enacted. It was intra vires s. 5 of the Act of 1865, and was (again adopting the words of s. 5) a colonial law for the time being in force when the Bill to repeal s. 7A was introduced in the Legislative Council.

The question then arises, could *that* Bill, a repealing Bill, after its passage through both chambers, be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner? In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of s. 5 of the Act of 1865 states a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that s. 7A may be repealed (in other words, in order that *that* particular law " respecting the constitution, powers and procedure " of the legislature may be validly made) the law for that purpose must have been passed in the manner required by s. 7A, a colonial law for the time being in force in New South Wales. An attempt was made to draw some distinction between a Bill to repeal a statute and a Bill for other purposes and between " making " laws and the word in the proviso, " passed." Their Lordships feel unable to draw any such distinctions. As to the proviso they agree with the views expressed by Rich J. in the following words: " I take the word ' passed ' to be equivalent to ' enacted.' The proviso is not dealing with narrow questions of parliamentary procedure " ; and later in his judgment: " In my opinion the proviso to s. 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of law making."

Again, no question of repugnancy here arises. It is only a question whether the proposed enactment is intra vires or ultra vires s. 5. A Bill, within the scope of sub-s. 6 of s. 7A, which received the Royal assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature. It would be ultra vires s. 5 of the Act of 1865. Indeed, the presentation of the Bill to the Governor without such approval would be the commission of an unlawful act.

In the result, their Lordships are of opinion that s. 7A of the Constitution Act, 1902, was valid and was in force when the two Bills under consideration were passed through the Legislative Council and the Legislative Assembly. Therefore these Bills could not be presented to the Governor for His Majesty's assent unless and until a majority of the electors voting had approved them.

For these reasons, their Lordships are of opinion that the judgment of the High Court dismissing the appeal from the decree of the Supreme Court of New South Wales was right

J. C.
1932
ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* TRETHOWAN.

and that this appeal should be dismissed with costs. In accordance with the usual practice the interveners will not receive any costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *Light & Fulton.*

Solicitors for respondents: *Halsey, Lightly & Helmsley.*

Solicitors for interveners: *Treasury Solicitors; Coward, Chance & Co.*

Applied. COMMONWEALTH OF AUSTRALIA *v.* BANK OF NEW SOUTH WALES. [1949] 2 All E.R. 755.

Considered. COMMONWEALTH OF AUSTRALIA *v.* BANK OF NEW SOUTH WALES [1950] A. C. 285

[PRIVY COUNCIL.]

J. C.*
1932
June 21.

JAMES . . . . APPELLANT;

AND

COWAN AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Freedom of inter-State Trade—Compulsory Acquisition of Dried Fruit in South Australia—Privy Council—Competence of Appeal—Limits inter se of Constitutional Powers—Dried Fruits Act, 1924 (*No.* 1657 *of* 1924; *South Australia*), *ss.* 20, 28—*Commonwealth of Australia Constitution Act* (63 & 64 *Vict. c.* 12) *Constitution, ss.* 74, 92.

Sect. 28 of the Dried Fruits Act, 1924, of South Australia, does not authorize the Minister of Agriculture to make orders for the compulsory acquisition of dried fruits with the object of forcing the surplus of dried fruits off the Australian market, as that object involves directly, and not merely incidentally, an interference with the freedom of inter-State trade contrary to s. 92 of the Commonwealth Constitution, to which section the powers given by s. 28 of the Dried Fruits Acts are expressly subject.

James v. *State of South Australia* (1927) 40 C. L. R. 1 approved.

State of New South Wales v. *The Commonwealth* (1915) 20 C. L. R. 54 discussed.

The decision of the High Court of Australia as to the validity of the orders was not a decision as to the limits inter se of the constitutional powers of the Commonwealth and of any State or States within the meaning of s. 74 of the Commonwealth Constitution so as to render an appeal to the Privy Council incompetent in the absence of a certificate by the High Court; that was so whether or not s. 92 of the Constitution bound the Commonwealth as well as individual States.

Jones v. *Commonwealth Court of Conciliation and Arbitration* [1917] A. C. 528 distinguished.

Judgment of the High Court of Australia, 43 C. L. R. 386, reversed.

* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD HANWORTH M.R., LORD ATKIN, and LORD RUSSELL OF KILLOWEN.

APPEAL (No. 74 of 1931) from a judgment of the High Court of Australia (March 21, 1930) affirming a judgment of Starke J. (November 7, 1929) sitting as a judge of original jurisdiction in that Court.

The appellant was a fruit grower and dryer carrying on business in South Australia, who in the course of his business sold his products in South Australia and in other States, and by export out of Australia. At various dates in 1927 the appellant's stocks of dried fruits were seized under orders for their compulsory acquisition made by the first respondent, the Minister for Agriculture for South Australia, under s. 28 of the Dried Fruits Act, 1924, of that State. The appellant brought an action against the respondents in the Supreme Court of Australia, contending that the orders were invalid and claiming damages for trespass.

The facts of the case and the material terms of the Dried Fruits Act appear from the judgment of the Judicial Committee.

Sect. 92 of the Commonwealth Constitution, to which section the powers given by s. 28 of the Dried Fruits Act are expressly subject, provides " on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. . . . ."

The case was removed into the High Court of Australia under the provisions of the (Commonwealth) Judiciary Act, 1903–1927, in the manner stated in the present judgment, and was heard by Starke J. The learned judge held that the orders were valid; he accordingly dismissed the action, but in case his decision should be reversed he assessed the damages at 12,145*l*. 4*s*. 10*d*.

The judgment of Starke J. was affirmed upon appeal by a majority—namely, Knox C.J., Gavan Duffy J. and Rich J.; Isaacs J. dissenting. The appeal is reported at 43 C. L. R. 386.

Upon the present appeal a further question arose—namely, whether the appeal was competent under s. 74 of the Commonwealth Constitution in the absence of a certificate by the High Court.

Sect. 74 provides: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

1932. April 25, 26, 28, 29; May 2, 3, 5. *W. A. Greene K.C.* and *Wilfrid Barton* for the appellant. The orders under which the appellant's dried fruits were seized were invalid under s. 28 of the Dried Fruits Act upon two grounds: first, because they were not made "for the purposes" of the Act; secondly, because they were contrary to s. 92 of the Commonwealth Constitution, and the powers given by s. 28 are expressly subject to that section. As to the first ground: The purposes of the Act are those specifically provided in ss. 19 and 20. It is not sufficient that the Minister considered that a compulsory acquisition would promote what he thought were the general purposes of the Act. Sect. 17, sub-s. 2 and s. 36 show that the words "for the purposes of this Act" cannot be given the vague and general meaning proposed. The title, "An Act to make better provision for the marketing of dried fruits, and for other purposes," cannot be relied on as showing what were the purposes of the Act; in any case it does not show that the orders in question were made for the purposes of the Act. The powers given by s. 28 are merely ancillary to the purposes stated in ss. 19 and 20, of which s. 20 alone is material to this case. But the respondents denied throughout that the orders were made for the purpose of supporting the determinations made under s. 20. Further, in *James* v. *State of South Australia* (1), the High Court held, and rightly held, that s. 20 was invalid, as being contrary to s. 92 of the Commonwealth Constitution. As to the second ground: Sect. 28 authorized only expropriations which did not violate s. 92 of the Constitution, therefore a seizure which violated s. 92 is ultra vires under s. 28. The true effect of s. 92 has been the subject of several decisions of the High Court of Australia: *State of New South Wales* v. *The Commonwealth* (known as the *Wheat* case) (1); *Foggitt, Jones & Co., Ld.* v. *State of New South Wales* (2); *Duncan* v. *State of Queensland* (3); *W. & A. McArthur, Ld.* v. *State of Queensland* (4); *James* v. *State of South Australia* (5); *Roughley* v. *State of New South Wales* (6); *Ex parte Nelson* [*No.* 1]. (7) Although the judgments are somewhat conflicting they show a consensus of opinion that the restriction created by s. 92 is not confined to customs, or similar obstacles to trade, imposed at the border of a State: *W. & A. McArthur's* case. (8) The object of the orders in the present case was to prevent the appellant from selling in Australia, and the seizures were of the whole of his stocks, including fruit in the course of, or appropriated for, delivery under contracts for delivery in other States. They consequently interfered directly with the freedom of inter-State trade, and were invalid under s. 92. The decision of the majority of the High Court was based upon the *Wheat* case. (1) The correctness of that decision is not admitted, but in any case it does not apply, as the orders now in question were made with the object of preventing inter-State trade.

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(1) 40 C. L. R. 1.

Sir William Jowitt K.C. and *Fullager* (with them *Harold Murphy*) for the respondents. This appeal is incompetent under s. 74 of the Commonwealth Constitution in the absence of a certificate by the High Court. Having regard to the power of the Commonwealth under s. 51 (i.) of the Constitution and the power of the State under ss. 107 and 112 the case involved, within s. 74, a question as to the limits inter se of those constitutional powers: *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (9); *In re Nelson* [*No.* 2]. (10) The appellant accepts the present authoritative view that s. 92 does not bind the Commonwealth (*W. & A. McArthur's* case (11)),

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(1) 20 C. L. R. 54.
(2) (1916) 21 C. L. R. 357.
(3) (1916) 22 C. L. R. 556.
(4) (1920) 28 C. L. R. 530.
(5) 40 C. L. R. 1.
(6) (1928) 42 C. L. R. 162.
(7) (1928) 42 C. L. R. 209.
(8) 28 C. L. R. 530, 553.
(9) [1917] A. C. 528.
(10) (1929) 42 C. L. R. 258.
(11) 28 C. L. R. 530, 556, 563.

J. C.
1932
JAMES
v.
COWAN.

but even if the power under s. 51 is limited by s. 92 there is still involved a question of the nature stated in s. 74. The view of Napier J. that the case came within ss. 38 (*a*) and 40 (*a*) of the Judiciary Act, which follow the wording of s. 74, was accepted by Starke J., though he made an order under s. 40. That being so the appellant cannot now contend that the matter is now within s. 74.

To the merits of the appeal: The purposes of the Dried Fruits Act referred to in s. 28 were not confined to those appearing from ss. 19 and 20, which are enabling sections for carrying out the purposes; s. 28 gives a power independent of those under ss. 19 and 20. The marketing outside Australia of the surplus of fruit, and so preventing a glut, was a purpose of the Act. The preamble, or full title, forms part of the Act and should be considered in ascertaining what were the purposes referred to: *Fielding* v. *Morley Corporation.* (1) The price to the consumer was not the only matter for the legislature to consider: *Att.-Gen. of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2) Both Courts in Australia found that the orders under which the appellant's stocks were seized were made bona fide for the purpose of preventing a glut. The validity of s. 20 is therefore not vital to the respondents' case; if it is, the respondents submit that *James* v. *State of South Australia* (3) was wrongly decided. Its validity, and the validity of the orders, depend upon the true effect of s. 92 of the Constitution. The true test is whether what is complained of discriminates between intra-State trade and inter-State trade, and so interferes with inter-State trade as such. That view is supported by passages in judgments of the High Court already referred to. Sect. 20, and the determinations under it, did not affect inter-State trade as such, since it imposed upon it no restriction not imposed upon intra-State trade. It is to be presumed that the legislature of South Australia did not intend that the Dried Fruits Board should do anything unconstitutional under s. 20: *MacLeod* v. *Att.-Gen. for New*

(1) [1899] 1 Ch. 1.
(2) [1913] A. C. 781, 801.
(3) 40 C. L. R. 1.

South Wales (1); *D'Emden* v. *Pedder.* (2) The *Wheat* case (3) was rightly decided, even if all the grounds stated for the decision are not satisfactory; the case cannot be distinguished from the present case. [Reference was made also to *Fox* v. *Robbins* (4); *Rex* v. *Smithers* (5); *West* v. *Kansas Natural Gas Co.* (6); *Dahnke-Walker Milling Co.* v. *Bondurant.* (7)]

W. A. Greene K.C. in reply. This case is not within s. 74 of the Commonwealth Constitution. The question is not as to the limits of powers inter se, but whether s. 28 of the Dried Fruits Act and the orders, were ultra vires having regard to s. 92 of the Constitution. *Jones*' case (8) is distinguishable. There the States of New South Wales and of Queensland each had jurisdiction over part of the matter, and the Commonwealth had jurisdiction over the whole. The appellant adopts the reasoning of Dixon J. in *In re Nelson* [*No.* 2]. (9) This case was tried in the High Court in consequence of the order under s. 40 of the Judiciary Act; the suggested estoppel therefore does not arise. Further, the first ground of the appeal is that the orders were not made for the purposes of the Dried Fruits Act, and, even if the second ground is within s. 74, the appeal is not wholly incompetent: *Baxter* v. *Commissioners of Taxation for New South Wales.* (10) The respondents by contending that *James* v. *State of South Australia* (11) was wrongly decided cannot make an otherwise competent appeal incompetent. To the merits: the full title of the Dried Fruits Act should not be considered in ascertaining what were the purposes of the Act: *Fenton* v. *J. Thorley & Co.* (12); *Vacher & Sons* v. *London Society of Compositors.* (13) In any case the full title refers only to "marketing" and makes no mention of compulsory acquisition. Discrimination against inter-State trade may make legislation invalid under s. 92 of the Constitution, as in *Fox* v. *Robbins* (4),

(1) [1891] A. C. 455.
(2) (1904) 1 C. L. R. 91.
(3) 20 C. L. R. 54.
(4) (1909) 8 C. L. R. 115.
(5) (1912) 16 C. L. R. 99.
(6) (1911) 221 U. S. 229.
(7) (1921) 257 U. S. 282.
(8) [1917] A. C. 528.
(9) 42 C. L. R. 258, 272–5.
(10) (1907) 4 C. L. R. 1087, 1116, 1151.
(11) 40 C. L. R. 1.
(12) [1903] A. C. 443, 447.
(13) [1913] A. C. 107.

J. C.
1932
JAMES
v.
COWAN.

but it does not follow that absence of discrimination makes legislation valid. If discrimination was intended to be the test, that word would have been used in s. 92 as it was in s. 102 of the Constitution. The High Court, in the cases already referred to, reject absence of discrimination as being the test. Upon the analogy of the respective legislative powers of the Dominion of Canada and the Provinces validity under s. 92 of the Constitution depends upon the real object of the legislation, or executive action, in question : *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (1) ; *In re Insurance Act of Canada* (2), and cases referred to in those judgments.

June 21. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the High Court of Australia in an action in which the plaintiff, a resident in South Australia, claimed damages from the defendants, for trespass to his goods. The plaintiff is a producer of dried fruits, currants and raisins. The defendants are the then Minister of Agriculture for South Australia and the members and servants and agents of the Dried Fruits Board set up by the Dried Fruits Act, 1924, of the legislature of South Australia, 15 Geo. 5, No. 1657. The defendants justify the alleged trespasses under the Act ; the plaintiff denies that the acts done were authorized by the Act, and alleges that if they were, the authority given and the acts done under the authority were invalid by reason of s. 92 of the Constitution of Australia, which provides that trade, commerce and intercourse among the States shall be absolutely free.

When the case came on before Napier J. in South Australia he took the view that the question raised as to s. 92 was a question " as to the limits inter se of the constitutional powers of the Commonwealth and of the State," and that, therefore, by s. 40 (*a*) of the Judiciary Act, 1903, as amended by the Judiciary Act of 1907, the cause was automatically removed from his jurisdiction to that of the High Court. On the case coming on before Starke J. on a summons for

(1) [1929] A. C. 260.

(2) [1932] A. C. 41.

directions, that learned judge, while agreeing with Napier J., thought it better to make an order removing the cause to the High Court under s. 40 of the Judiciary Act, a power which he undoubtedly possessed, as the case clearly involved the interpretation of the Constitution. At the hearing of the action Starke J. gave judgment for the defendants, and this judgment was upheld on appeal by the High Court, Knox C.J., Gavan Duffy J. and Rich J., Isaacs J. dissenting. On appeal to His Majesty in Council a preliminary objection was made by the respondents that the appeal was incompetent by reason of s. 74 of the Constitution, which provides that no appeal shall be permitted to the Queen in Council upon any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State without a certificate of the High Court. No such certificate had been asked for. It will be more convenient to deal with the preliminary point after considering how the constitutional question arises on the facts of this case.

The production of dried fruits, which for all relevant purposes in this case means dried currants, sultanas and lexias (a species of raisin), is an industry of chief importance in South Australia, Victoria and, to a less extent, Western Australia. The fruit having been grown, prepared, dried, pressed and packed, finds a market in its native State, in the other States of Australia, in New Zealand, and in London. The production is much greater than the consumption in Australia. It appears to be admitted that about 15 per cent. of the total production of Australia and no more can be consumed in Australia ; the surplus has to be exported elsewhere. It is unnecessary to say that this 15 per cent. is obviously in excess of the possible consumption in any producing State, for it includes the consumption in New South Wales and Queensland, which for producing purposes may be ignored. Unlimited competition, therefore, in Australia would naturally injure the native grower by depriving him of the advantage of a protected market, and leaving him mainly dependent upon obtaining for his exports out of the Commonwealth the world price. In 1924 the

Commonwealth and the producing States concerned had recourse to legislation to deal with the question of marketing dried fruits. The Commonwealth passed the Dried Fruits Export Control Act, 1924, in October, 1924. Under that Act the Minister had power through a system of licensing to control the export of dried fruits from the Commonwealth, and a Dried Fruits Control Board was constituted which had power to control the fruit so brought under licence. This Act, however, only related to export from the Commonwealth. Dealings with dried fruits in the States were left to the State legislatures. Both Victoria and South Australia passed Dried Fruits Acts in 1924. This appeal is concerned with the South Australian Act, which was assented to on December 24, 1924. It was not to come into force until the Governor was satisfied that there was similar legislation in force in Victoria. The Act constituted a Dried Fruits Board of five members, three of whom were to be appointed by growers, the other two being official members. By s. 19 the Board was to have power to make contracts with any person in respect to the purchase or sale of dried fruits produced in Australia: (6.) "To enter into contracts with Boards appointed under legislation in force in other States with objects similar to those of this Act, for concerted action in the marketing of dried fruits produced in Australia and for purposes incidental thereto, and to carry out such contracts," and it had power to open shops, fix maximum prices, and by advertising or other appropriate means encourage the consumption of dried fruits.

Sect. 20 of the Act provided: "(1.) The Board shall also have power in its absolute discretion from time to time to determine where and in what respective quantities the output of dried fruits produced in any particular year is to be marketed and to take whatever action the Board thinks proper for the purpose of enforcing such determination." Notice of every determination was to be given to the public and to every grower affected. There were provisions for the registration of growers, dealers and packing sheds, with an obligation on the persons registering to give particulars of their past and expected future out-turn.

Sect. 28 of the Act is the section under which the present dispute arises; it provides—"28.—(1.) Subject to s. 92 of the Commonwealth of Australia Constitution Act and for the purposes of this Act or of any contract made by the Board, the Minister may on behalf of His Majesty purchase by agreement or acquire compulsorily any dried fruits in South Australia, grown and dried in Australia, not being dried fruits which are held for export under and in accordance with a valid and existing licence granted under the Dried Fruits Export Control Act, 1924, of the Parliament of the Commonwealth, or of which the Board constituted under that Act has accepted the control for the purposes of that Act, or which are included in any contract referred to in s. 18 of that Act: Provided that the Minister under the powers conferred by this Act shall not acquire compulsorily any such dried fruits in any case where the owner or the person having the control thereof has exported or arranged to export such quantity as he is licensed to export under and in accordance with such a licence as aforesaid and such further quantity (if any) as is determined by the Minister and for the export of which a licence can be obtained under the said Commonwealth Act. (2.) The Minister may authorise the Board to acquire on his behalf any dried fruits which this Act empowers him to acquire. (3.) Any dried fruits acquired pursuant to this Act may be sold by the Minister in such manner as he thinks fit."

For any fruit so acquired by the Minister the owner by s. 29, sub-s. 2, was to be entitled to receive the export parity price, which by s. 3 meant the selling price in London of the like Australian dried fruits, less freight, insurance and other charges. Sect. 30 annulled all existing agreements in writing for the sale of dried fruits to be produced in 1925, with the exception of certain contracts already made by dealers with growers. Power was given to the Governor to make regulations dealing with the marketing of dried fruits, inspection and granting of certificates of quality, registration and other matters, and substantial penalties were enacted for interfering with the Board or the Minister and for breach of the regulations.

In 1926 in pursuance of the Act, the Dried Fruits Board made several determinations, notices of which were duly published. The plaintiff was himself a grower of fruits, and a dealer, and owned a registered packing shed, in which he prepared and packed the fruit which he had either grown himself or bought from others. He apparently disputed the validity of the determinations and refused to obey them, and sold his dried fruits to other States in Australia in excess of the proportions fixed in the respective determinations. Proceedings were issued against him by the Board for penalties for breach, but they stood adjourned from time to time pending the hearing of an action in the High Court, which the present plaintiff instituted against the State to have the determinations declared invalid. In this action the plaintiff was eventually successful: judgment was given in August, 1927, declaring the determinations invalid. (1)

Meantime, on February 26, 1927, the Board gave notice of a determination for 1927. It follows the form of the determination of 1926, and it is relevant to notice what it purports to declare :—

"DRIED FRUITS ACTS, 1924–1926.

Notice of Determination made by the Dried Fruits Board.

Notice is hereby given that the Dried Fruits Board has made the following determination under s. 20 of the Dried Fruits Act, 1924, namely :—That the proportion of the output of currants, sultanas and lexias produced in the year 1927 which may be marketed in the Commonwealth of Australia by any of the following persons, that is to say—(*a*) any grower ; (*b*) any dealer ; or (*c*) any person being the owner or occupier or person in charge of any packing shed—shall not be more than the following :—For currants, 15 per cent. ; for sultanas, 10 per cent. ; for lexias, 10 per cent. This determination shall operate until rescinded or varied by a subsequent determination. Dated February 26, 1927.

By order of the Board,

W. N. TWISS, *Secretary*."

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(1) *James* v. *State of South Australia*, 40 C. L. R. 1.

This determination was arrived at as the result of an inter-State conference, as appears from a minute of a meeting of the Board on February 24, 1927. Apparently the Board had not much hope that James would pay any more attention to this determination than he had to those of 1926, and they decided to adopt with regard to him a different procedure, as appears from the minutes of the meeting of the Board on March 4, 1927 :—

"Minutes of Meeting of Board held March 4, 1927, at 10.30 A.M.

The following line of action was agreed to in respect of James, and Secretary was instructed accordingly : (1.) To ascertain when the Minister would be returning and how long he will remain in the city. (2.) To ascertain if James has any fruit in his shed on the date the Minister is likely to return to the City. (3.) Secretary then to apply to the Minister for order of acquisition. (4.) On receipt of the order from the Minister, Inspector Carne to be despatched immediately to Berri with order of acquisition, with instructions to serve same on James, at the same time Inspector Carne to serve notice on James to supply particulars of all his selling contracts (under section 7 of the Amending Act).

Mr. Benham's draft notice (referred to in 4 above) was submitted and approved, subject to the striking out of the words 'likely to be sold,' wherever these appear in the notice.

Secretary was directed to communicate immediately with Supervisor Haynes of Berri, instructing him to telephone Secretary on Monday afternoon next what fruit, if any, had been delivered to James' shed in order that the above programme may be carried out."

Accordingly, on March 7, 1927, Mr. Butterfield, then Minister of Agriculture, authorized the Dried Fruits Board to acquire on his behalf 77,150 lbs. of dried fruits which were on March 5 in the registered packing shed of James, and on the same day the Board made an order declaring that the said quantity was acquired by His Majesty the King, and on the same day authorized the defendant Carne, an officer of the Board, to seize and take possession of the fruit. The order was taken by Carne, who attended at James' packing shed on March 8 with two other officers and seized and marked the packages of fruit. After the first two or three orders the practice was for the Minister himself to declare the acquisition, and the Board then gave the necessary authority to seize to their officer. The defendant Mr. Cowan did not become Minister till April, and the first order made by him was on April 13, 1927, and may be set out :—

"ORDER MADE UNDER THE 'DRIED FRUITS ACTS, 1924 TO 1926.'

"I, the Honourable John Cowan, M.L.C., the Minister of Agriculture for the State of South Australia, the Minister of the Crown to whom the administration of the 'Dried Fruits Acts, 1924 to 1926,' is for the time being committed by the Governor, do hereby, pursuant to the powers conferred on me by Section 29 of the said Act and all other powers me enabling, declare that the dried fruits described in the schedule hereunder are acquired by His Majesty the King.

SCHEDULE.

The whole of the dried fruit which at the hour of five o'clock in the afternoon of April 12, 1927, was in or about the packing shed of Frederick Alexander James at Berri, in the State of South Australia, and which under orders previously served upon the said Frederick Alexander James has not been acquired by His Majesty the King.

Dated April 13, 1927.

J. COWAN,
Minister of Agriculture."

Subsequent orders, as, for instance, on April 30, 1927, were made on separate forms, the first defining the fruit as not marked "I. S. C.," or "Required for Inter-State Contracts," the second as marked "I. S. C.," or "Required for Inter-State Contracts." Both alike were to be seized.

The result was that by a series of orders, the last of which was made on August 15, 1927, most of the plaintiff's fruit was seized. There appears to their Lordships to be little doubt that the intention was to seize the whole of the fruit, but apparently, in the intervals between the different orders, James was able to get away a certain quantity of fruit to satisfy his inter-State trade. It is beyond dispute that, unless the seizures can be justified under the Act, they were legal wrongs for which the plaintiff had a remedy, and the trial judge assessed the damages on that footing at 12,145*l.* 4*s.* 10*d.*, though, being of opinion that the defendants could justify under the Act, he gave judgment for the defendants.

On August 22, 1927, in the action of *James* v. *State of South Australia* (1), the High Court held that the provisions of s. 20 and the determinations of the Board made thereunder were invalid, as offending against s. 92 of the Constitution, which provides that trade, commerce and intercourse among the States shall be absolutely free. It was contended that this decision was wrong. The restriction imposed upon the powers of the State was, it is said, limited to interference with inter-State commerce " as such." Legislation which applied equally to commerce within the State, as well as to inter-State commerce, and was designed for the welfare of the State, was not affected by s. 92. It appears to their Lordships unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by s. 92. In the present case they are clearly of opinion that s. 20 and the determinations made under it were directed at inter-State commerce as such. They were intended to prevent persons in South Australia from selling more than the fixed quota in any of the Australian States. The quota was fixed by reference to the needs of all the States ; and the prohibition of the sale of the surplus was against selling to any of the States. As the determination said, " The proportion which may be marketed in the Commonwealth of Australia shall not be more than " the prescribed proportion. If this leaves inter-State commerce " absolutely free," the constitutional charter might as well be torn up. Their Lordships have no hesitation in agreeing with the decision of the High Court on this point.

(1) 40 C. L. R. 1.

Their Lordships have not failed to notice a suggestion made by Isaacs J. that the fixing and enforcement of a quota was an essential part of the whole Act, and that what is left is so substantially different from the original that the residue could not fairly be said to represent the meaning of the legislature. The learned judge did not, however, proceed to found his judgment on what he calls this annihilating principle, and, as it was not pressed upon this Board by the appellant, their Lordships also forbear from further discussion of a matter which upon another occasion may require serious consideration.

The conclusion that s. 20 and the determinations made thereunder violate s. 92 of the Constitution has a direct bearing upon the immediate question raised on this appeal—namely, whether the orders for acquisition made by the Minister are valid. The orders were attacked by the plaintiff on two grounds: (1.) That they were not made "for the purposes of the Act" within the meaning of these words in s. 28; (2.) That they violated s. 92 of the Constitution.

On the first contention the plaintiff's argument was that the purposes of the Act are to be ascertained by reference to ss. 19 and 20 of the Act. The orders of acquisition were, it is said, certainly not made for any of the purposes named in s. 19, and they were not made for the purpose of supporting the determinations or for maintaining any quota, whether fixed by the Board or the Minister: for the fact that the Minister purported to seize all the plaintiff's fruit, and that whether intended for inter-State trade or not, showed that the Minister had no quota in his mind. The plaintiff urged in support of this view the damaging and uncontradicted statements made to a representative of the Press by Mr. Twiss, the secretary of the Dried Fruits Board, one of the defendants. In view of the finding of the trial judge, their Lordships do not think it would be right to adopt any view of the facts which would appear to suggest bad faith on the part of the Minister or his advisers. Without any suggestion, however, of any indirect motive, they cannot avoid being impressed with the view that the action taken was due to the initiative of the Board, that the essence of the matter was that the determinations of the Board as to a quota must be observed in order that the Act should operate fairly amongst all producers, and that the method of acquisition was adopted with that object.

The learned trial judge, however, thus stated his view of the facts: "But the truth is, I think, that the Minister and the Board were doubtful of both the validity and the practical efficacy of the determinations, and resolved to regulate and control the marketing of dried fruits, and particularly the plaintiff's dried fruits, by another method sanctioned by the Act, namely, compulsory acquisition. They did not do it with the object or intention of bolstering up invalid determinations, or of punishing the plaintiff, or of benefiting particularly the members of the Australian Dried Fruits Association, or of obstructing, interfering with or preventing the plaintiff carrying on his business, whether domestic or inter-State, or of deterring or intimidating the plaintiff and others, or of obtaining the approval and support of the members of the Australian Dried Fruits Association, or with any like intent. As the consumption of dried fruits in Australia was not sufficient to absorb the output, the Government of the Commonwealth, the fruit-growing States, the Minister, and the Board were convinced that the surplus would glut the Australian market and cause a fall in prices, which, it was supposed, would be detrimental to the progress and stability of the dried fruits industry, however beneficial it might be to the consumers of dried fruits. So, in pursuance of the scheme, in which the Commonwealth and the fruit-growing States had joined, the Minister and the Board resolved to use the powers apparently conferred upon them by legislation to prevent the evils feared, and to force the surplus fruit off the Australian market. And, if a grower would not fall in voluntarily with the scheme, then he must be compelled to do so, and the marketing and sale of his fruit regulated and controlled by some method allowed by the Act."

In view of this finding, which was accepted by the full Court on appeal, their Lordships are not disposed to decide the case on the first contention of the plaintiff.

On the second contention—namely, that the orders made by the Minister were invalid, because they infringed s. 92, in their Lordships' opinion the plaintiff is entitled to succeed. Starke J. appears to have decided this part of the case by reference to the decision of Griffith C.J. in *New South Wales* v. *The Commonwealth* (1), generally known as the *Wheat* case. This is based on the view that s. 92 does not affect powers of acquisition, which, it is said, merely change the ownership, and do not regulate the disposition of goods by the owner. In substance it means that the Crown becomes the owner, and the Crown can do what it pleases with its own, dispose of it inter-State or not as it chooses. This doctrine was repudiated by counsel for the defendants.

Their Lordships would not be prepared to assent to it stated in the simple form which commended itself to Griffith C.J. If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions. The Constitution is not to be mocked by substituting executive for legislative interference with freedom. But, in the present case, the Courts are not faced with the problem of construing an Act of the legislature which contains no reference to s. 92. In this case the powers given to the Minister are expressly conditioned as subject to the section. Sect. 28 appears to mean that the Minister may acquire compulsorily so that he does not interfere with the absolute freedom of trade among the States and acquires for the purposes of the Act. Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade. It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected. But, in the present case, it appears to their Lordships, as it did to Isaacs J., that the statement of the objects of the Minister and the Board, as expressed in the finding of Starke J. set out above, makes it plain that the direct object of the exercise of the powers was to interfere with inter-State trade. "To force the surplus fruit off the Australian market" appears necessarily to involve two decisions: first, the fixing of a limited amount for Australian consumption (a necessary element in the conception of a "surplus"); secondly, the prevention of the sale of the balance of the output in Australia. In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Sect. 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid.

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(1) 20 C. L. R. 54.

It follows from what has been said that the plaintiff established his cause of action and was entitled to have judgment for the amount of damages found by the trial judge.

It remains, however, to dispose of the preliminary point that the decision of the High Court was a decision upon a question "as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States," and that by s. 74 of the Constitution no appeal lay to His Majesty in Council from such a decision without a certificate of the High Court, which had not been asked for. It has been convenient to reserve discussion of this point until the effect of the legislation could be considered in the merits; but had their Lordships acceded to the objection they would, of course, not have dealt with the substance of the appeal. But, in their Lordships' opinion, the present case does not fall within s. 74. At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times by the High Court—namely, whether s. 92 applies to the Commonwealth as well as to the individual States. If to both, it was almost conceded that no question of limits inter se would arise. If to the States alone, then the violation of s. 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under s. 74. Their Lordships, however, do not find it necessary to decide the question as to the application of s. 92, which will remain for them an open question. If the implied prohibition in s. 92 applies to both Commonwealth and States it would seem reasonably clear that there are no competing powers; the prohibited area is denied to both. But similarly, if the prohibition is addressed to the States alone, no question arises as to limits of powers between State and Commonwealth. The State is forbidden to pass legislation or to grant executive powers of a certain kind (interfering with absolute freedom of inter-State trade, etc.). The only question is whether it has violated the prohibition or not. The Commonwealth powers on this footing are undisputed. There are no boundaries between the one and the other which come into question. Their Lordships see no difference in this respect between the provisions of s. 92 and those of s. 115, which prohibit a State from coining money. The Commonwealth has such a right, but if a State were alleged to be violating s. 115 there would be only a simple question of whether the prohibition had been ignored or not: no question of the limits of State and Commonwealth powers inter se would arise. The case of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) appears to be a very different case. There the Commonwealth by its legislation as to industrial disputes had deliberately entered the State territory and automatically restricted the State's powers. There appears to have been a plain question as to the limits inter se of the restrictive powers. For these

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(1) [1917] A. C. 528.

J. C.
1932
JAMES
v.
COWAN.

reasons their Lordships are of opinion that the appeal was competent.

In the result their Lordships find themselves in accord with the convincing judgment delivered by Isaacs J. in the High Court. They are of opinion that the appeal should be allowed, the order of the High Court on appeal dated March 21, 1930, and of Starke J., dated November 7, 1929, should be set aside, and judgment should be entered for the plaintiff against the defendants for 12,145*l*. 4*s*. 10*d*., the plaintiff to have the costs of the action and of the appeal to the High Court. They will humbly advise His Majesty accordingly. The defendants must pay the costs of the appeal to His Majesty in Council.

Solicitors for appellant: *Justice & Pattenden.*
Solicitors for respondents: *Sutton, Ommanney & Oliver.*

[1951] 2 K. B. 164

v. BUCKLAND
…FORD, ETC. CO.
…9] 1 K. B. 410

Applied. HORTON *v.* LONDON GRAVING DOCK CO., LD. [1950] 1 K. B. 421

Applied. PRATT *v.* RICHARDS [1951] 2 K. B. 208

Dictum of LORD ATKIN, at p. 580, *applied.* DAVIES *v.* SWAN MOTOR CO., LTD. [1949] 1 All E.R. 620.

[HOUSE OF LORDS.]

H. L. (Sc.)* M'ALISTER (OR DONOGHUE) (PAUPER) . APPELLANT;

1932
May 26.

AND

STEVENSON . . . . RESPONDENT.

Negligence—Liability of Manufacturer to ultimate Consumer—Article of Food—Defect likely to cause Injury to Health.

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:—

So *held*, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. *Skivington* (1869) L. R. 5 Ex. 1 approved.

Dicta of Brett M.R. in *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, 509–11 considered.

Mullen v. *Barr & Co., Ld.*, and *M'Gowan* v. *Barr & Co., Ld.*, 1929 S. C. 461 overruled.

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

By an action brought in the Court of Session the appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The appellant by her condescendence averred that the bottle of ginger-beer was purchased for the appellant by a friend in a café at Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

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* *Present:* LORD BUCKMASTER, LORD ATKIN, LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

The respondent objected that these averments were irrelevant and insufficient to support the conclusions of the summons.

The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof.

The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action.

1931. Dec. 10, 11. *George Morton K.C.* (with him *W. R. Milligan*) (both of the Scottish Bar) for the appellant. The facts averred by the appellant in her condescendence disclose a relevant cause of action. In deciding this question against the appellant the Second Division felt themselves bound by their previous decision in *Mullen* v. *Barr & Co., Ld.* (1) It was there held that in determining the question of the liability of the manufacturer to the consumer there was no difference between the law of England and the law of Scotland—and this is not now disputed—and that the question fell to be determined according to the English authorities, and the majority of the Court (Lord Hunter dissenting) were of opinion that in England there was a long line of authority opposed to the appellant's contention. The English authorities are not consistent, and the cases relied on by the Court of Session differed essentially in their facts from the present case. No case can be found where in circumstances similar to the present the Court has held that the manufacturer is under no liability to the consumer. The Court below has proceeded on the general principle that in an ordinary case a manufacturer is under no duty to any one with whom he is not in any contractual relation. To this rule there are two well known exceptions: (1.) where the article is dangerous per se, and (2.) where the article is dangerous to the knowledge of the manufacturer, but the appellant submits that the duty owed by a manufacturer to members of the public is not capable of so strict a limitation, and that the question whether a duty arises independently of contract depends upon the circumstances of each particular case. When a manufacturer puts upon a market an article intended for human consumption in a form which precludes the possibility of an examination of the article by the retailer or the consumer, he is liable to the consumer for not taking reasonable care to see that the article is not injurious to health. In the circumstances of this case the respondent owed a duty to the appellant to take care that the ginger-beer which he manufactured, bottled, labelled and sealed (the conditions under which the ginger-beer was put upon the market being such that it was impossible for the consumer to examine the contents of the bottles), and which he invited the appellant to buy, contained nothing which would cause her injury: *George* v. *Skivington* (1); and see per Brett M.R. in *Heaven* v. *Pender* (2) and per Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins & Perkins*. (3) *George* v. *Skivington* (1) has not always been favourably commented on, but it has not been overruled, and it has been referred to by this House without disapproval: *Cavalier* v. *Pope*. (4) In the United States the law is laid down in the same way: *Thomas* v. *Winchester*. (5)

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(1) 1929 S. C. 461.

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(1) L. R. 5 Ex. 1.

(2) 11 Q. B. D. 503, 509 et seq.

(3) [1909] A. C. 640, 646.

(4) [1906] A. C. 428, 433.

(5) (1852) 6 N. Y. 397.

[He also referred to *Dixon* v. *Bell* (1); *Langridge* v. *Levy* (2); *Longmeid* v. *Holliday* (3); *Bates* v. *Batey & Co., Ld.* (4); *Weld-Blundell* v. *Stephens.* (5)]

W. G. Normand, Solicitor-General for Scotland (with him *J. L. Clyde* (of the Scottish Bar) and *T. Elder Jones* (of the English Bar)) for the respondent. In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract. Admittedly the case does not come within either of the recognized exceptions to the general rule, but it is sought to introduce into the law a third exception in this particular case—namely, the case of goods intended for human consumption sold to the public in a form in which investigation is impossible. The reason now put forward by the appellant was no part of Lord Hunter's dissent in the previous case; nor is there any hint of any such exception in any reported case. There is here no suggestion of a trap, and there are no averments to support it. It is said that people ought not to be allowed to put on the market food or drink which is deleterious, but is there any real distinction between articles of food or drink and any other article? In *Heaven* v. *Pender* (6) Brett M.R. states the principle of liability too widely, and in *Le Lievre* v. *Gould* (7) that principle is to a great extent whittled away by the Master of the Rolls himself and by A. L. Smith L.J. The true ground was that founded on by Cotton and Bowen L.JJ. in *Heaven* v. *Pender.* (6) In *Blacker* v. *Lake & Elliot, Ld.* (8) both Hamilton and Lush JJ. treat *George* v. *Skivington* (9) as overruled. Hamilton J. states the principle to be that the breach of the defendant's contract with A. to use care and skill in the manufacture of an article does not per se give any cause of action to B. if he is injured by reason of the article proving defective, and he regards *George* v. *Skivington* (9), so far as it proceeds on duty to the ultimate user, as inconsistent with *Winterbottom* v.

(1) (1816) 5 M. & S. 198.

(2) (1837) 2 M. & W. 519; (1838) 4 M. & W. 337.

(3) (1851) 6 Ex. 761.

(4) [1913] 3 K. B. 351.

(5) [1920] A. C. 956, 985.

(6) 11 Q. B. D. 503.

(7) [1893] 1 Q. B. 491.

(8) (1912) 106 L. T. 533.

(9) L. R. 5 Ex. 1.

Wright. (1) [Counsel also referred to Pollock on Torts, 13th ed., pp. 570, 571, and Beven on Negligence, 4th ed., vol. i., p. 49.] In England the law has taken a definite direction, which tends away from the success of the appellant.

George Morton K.C. replied.

The House took time for consideration.

1932. May 26. LORD BUCKMASTER (read by LORD TOMLIN). My Lords, the facts of this case are simple. On August 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer which have given rise to this appeal.

The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect. After certain amendments, which are now immaterial, the case came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed a proof. His interlocutor was recalled by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable: (1.) That the appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and (2.) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English and the Scots law on the subject are identical.

(1) (1842) 10 M. & W. 109.

It is therefore upon the English law alone that I have considered the matter, and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention; and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is the case of *Langridge* v. *Levy*. (1) It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands, and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B., who, in delivering the judgment of the Court, used these words: "We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby"; and in *Longmeid* v. *Holliday* (2) the same eminent judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application. The case of *Langridge* v. *Levy* (1), therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.

(1) 2 M. & W. 519; 4 M. & W. 337.
(2) 6 Ex. 761.

The case of *Winterbottom* v. *Wright* (1) is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action either in tort or arising out of contract. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted, also, that in this case Alderson B. said (2): "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

Longmeid v. *Holliday* (3) was the case of a defective lamp sold to a man whose wife was injured by its explosion. The vendor of the lamp, against whom the action was brought, was not the manufacturer, so that the case is not exactly parallel to the present, but the statement of Parke B. in his judgment covers the case of manufacturer, for he said: "It would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, ... but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." It is true that he uses the words "lent or given" and omits the word "sold," but if the duty be entirely independent of contract and is a duty owed to a third person, it seems to me to be the same whether the article be originally given or sold. The fact in the present case that the ginger-beer originally left the premises of the manufacturer on a purchase, as was probably the case, cannot add to his duty, if such existed, to take care in its preparation.

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(1) 10 M. & W. 109.
(2) 10 M. & W. 115.
(3) 6 Ex. 761, 768.

It has been suggested that the statement of Parke B. does not cover the case of negligent construction, but the omission to exercise reasonable care in the discovery of a defect in the manufacture of an article where the duty of examination exists is just as negligent as the negligent construction itself.

The general principle of these cases is stated by Lord Sumner in the case of *Blacker* v. *Lake & Elliot, Ld.* (1), in these terms: "The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective."

From this general rule there are two well known exceptions: (1.) In the case of an article dangerous in itself; and (2.) where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason, and this is known to the manufacturer. Until the case of *George* v. *Skivington* (2) I know of no further modification of the general rule.

As to (1.), in the case of things dangerous in themselves, there is, in the words of Lord Dunedin, "a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity": *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins.* (3) And as to (2.), this depends on the fact that the knowledge of the danger creates the obligation to warn, and its concealment is in the nature of fraud. In this case no one can suggest that ginger-beer was an article dangerous in itself, and the words of Lord Dunedin show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

Of the remaining cases, *George* v. *Skivington* (2) is the one nearest to the present, and without that case, and the statement of Cleasby B. in *Francis* v. *Cockrell* (4) and the dicta

(1) 106 L. T. 533, 536.
(2) L. R. 5 Ex. 1.
(3) [1909] A. C. 640, 646.
(4) (1870) L. R. 5 Q. B. 501, 515.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Buckmaster.

of Brett M.R. in *Heaven* v. *Pender* (1), the appellant would be destitute of authority. *George* v. *Skivington* (2) related to the sale of a noxious hairwash, and a claim made by a person who had not bought it but who had suffered from its use, based on its having been negligently compounded, was allowed. It is remarkable that *Langridge* v. *Levy* (3) was used in support of the claim and influenced the judgment of all the parties to the decision. Both Kelly C.B. and Pigott B. stressed the fact that the article had been purchased to the knowledge of the defendant for the use of the plaintiff, as in *Langridge* v. *Levy* (3), and Cleasby B., who, realizing that *Langridge* v. *Levy* (3) was decided on the ground of fraud, said: "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge* v. *Levy* (3) and this case is complete." It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence.

I do not propose to follow the fortunes of *George* v. *Skivington* (2); few cases can have lived so dangerously and lived so long. Lord Sumner, in the case of *Blacker* v. *Lake & Elliot, Ld.* (4), closely examines its history, and I agree with his analysis. He said that he could not presume to say that it was wrong, but he declined to follow it on the ground which is, I think, firm, that it was in conflict with *Winterbottom* v. *Wright.* (5)

In *Francis* v. *Cockrell* (6) the plaintiff had been injured by the fall of a stand on a racecourse, for a seat in which he had paid. The defendant was part proprietor of the stand and acted as receiver of the money. The stand had been negligently erected by a contractor, though the defendant was not aware of the defect. The plaintiff succeeded. The case has no bearing upon the present, but in the course of his judgment Cleasby B. made the following observation: "The point that Mr. Matthews referred to last was raised in the case of

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(1) 11 Q. B. D. 503, 509 et seq.
(2) L. R. 5 Ex. 1.
(3) 2 M. & W. 519.
(4) 106 L. T. 533, 536.
(5) 10 M. & W. 109.
(6) L. R. 5 Q. B. 501, 515.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Buckmaster.

George v. *Skivington* (1), where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action, and I would adopt the view which the Lord Chief Baron took in that case. He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person for whose use he knew it was purchased, and this duty having been violated, and he, having failed to use reasonable care, was liable in an action at the suit of the third person." It is difficult to appreciate what is the importance of the fact that the vendor knew who was the person for whom the article was purchased, unless it be that the case was treated as one of fraud, and that without this element of knowledge it could not be brought within the principle of *Langridge* v. *Levy.* (2) Indeed, this is the only view of the matter which adequately explains the references in the judgments in *George* v. *Skivington* (1) to *Langridge* v. *Levy* (2) and the observations of Cleasby B. upon *George* v. *Skivington.* (1)

The dicta of Brett M.R. in *Heaven* v. *Pender* (3) are rightly relied on by the appellant. The material passage is as follows: "The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. . . . . Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery or the like, for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty."

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(1) L. R. 5 Ex. 1.

(2) 2 M. & W. 519.

(3) 11 Q. B. D. 503, 509 et seq.

"The recognized cases" to which the Master of the Rolls refers are not definitely quoted, but they appear to refer to cases of collision and carriage and the cases of visitation to premises on which there is some hidden danger—cases far removed from the doctrine he enunciates. None the less this passage has been used as a tabula in naufragio for many litigants struggling in the seas of adverse authority. It cannot, however, be divorced from the fact that the case had nothing whatever to do with the question of manufacture and sale. An unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter, and the case really depended on the duty of the owner of the premises to persons so invited. None the less it is clear that Brett M.R. considered the cases of manufactured articles, for he examined *Langridge* v. *Levy* (1), and says that it does not negative the proposition that the case might have been supported on the ground of negligence.

In the same case, however, Cotton L.J., in whose judgment Bowen L.J. concurred, said that he was unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertained, inasmuch as there were many cases in which the principle was impliedly negatived. He then referred to *Langridge* v. *Levy* (1), and stated that it was based upon fraudulent misrepresentation, and had been so treated by Coleridge J. in *Blackmore* v. *Bristol and Exeter Ry. Co.* (2), and that in *Collis* v. *Selden* (3) Willes J. had said that the judgment in *Langridge* v. *Levy* (1) was based on the fraud of the defendant. The Lord Justice then proceeded as follows : " This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis* v. *Selden* (3) and in *Longmeid* v. *Holliday* (4) (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for. The case of *George* v. *Skivington* (5), and especially what is said by Cleasby B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby B. on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which (as he said) the decision in *Langridge* v. *Levy* (1) was based. In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act."

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(1) 2 M. & W. 519.

(2) (1858) 8 E. & B. 1035.

(3) (1868) L. R. 3 C. P. 495.

(4) 6 Ex. 761.

(5) L. R. 5 Ex. 1.

With the views expressed by Cotton L.J. I agree.

In *Le Lievre* v. *Gould* (2) the mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relationship between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of his negligence. In this case Lord Esher seems to have qualified to some extent what he said in *Heaven* v. *Pender* (3), for he says this: "But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is

(1) 2 M. & W. 519.
(2) [1893] 1 Q. B. 491, 497.
(3) 11 Q. B. D. 503, 509.

entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender* (1) has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

In that same case A. L. Smith L.J. said (2): "The decision of *Heaven* v. *Pender* (1) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. *Heaven* v. *Pender* (1) goes no further than this, though it is often cited to support all kinds of untenable propositions."

In *Earl* v. *Lubbock* (3) the plaintiff had been injured by a wheel coming off a van which he was driving for his employer and which it was the duty of the defendant under contract with the employer to keep in repair. The county court judge and the Divisional Court both held that, even if negligence was proved, the action would not lie. It was held by the Appeal Court that the defendant was under no duty to the plaintiff and that there was no cause of action. In his judgment Sir Richard Henn Collins M.R. said the case was concluded by the authority of *Winterbottom* v. *Wright* (4), and he pointed out that the dictum of Lord Esher in *Heaven* v. *Pender* (1) was not a decision of the Court, and that it was subsequently qualified and explained by Lord Esher himself in *Le Lievre* v. *Gould*. (5) Stirling L.J. said that in order to succeed in the action the plaintiff must bring his case within the proposition enunciated by Cotton L.J. and agreed to by Bowen L.J. in *Heaven* v. *Pender* (1), while Mathew L.J. made the following observation: "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their employment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade."

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(1) 11 Q. B. D. 503, 509.

(2) [1893] 1 Q. B. 504.

(3) [1905] 1 K. B. 253.

(4) 10 M. & W. 109.

(5) [1893] 1 Q. B. 491, 497.

In *Bates* v. *Batey & Co., Ld.* (1), the defendants, ginger-beer manufacturers, were held not liable to a consumer (who had purchased from a retailer one of their bottles) for injury occasioned by the bottle bursting as the result of a defect of which the defendants did not know, but which by the exercise of reasonable care they could have discovered. In reaching this conclusion Horridge J. stated that he thought the judgments of Parke B. in *Longmeid* v. *Holliday* (2), of Cotton and Bowen L.JJ. in *Heaven* v. *Pender* (3), of Stirling L.J. in *Earl* v. *Lubbock* (4), and of Hamilton J. in *Blacker* v. *Lake & Elliot, Ld.* (5), made it clear that the plaintiff was not entitled to recover, and that he had not felt himself bound by *George* v. *Skivington.* (6)

So far, therefore, as the case of *George* v. *Skivington* (6) and the dicta in *Heaven* v. *Pender* (7) are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

One further case mentioned in argument may be referred to, certainly not by way of authority, but to gain assistance by considering how similar cases are dealt with by eminent judges of the United States. That such cases can have no close application and no authority is clear, for though the source of the law in the two countries may be the same, its current may well flow in different channels. The case referred to is that of *Thomas* v. *Winchester.* (8) There a chemist issued poison in answer to a request for a harmless drug, and he

(1) [1913] 3 K. B. 351.
(2) 6 Ex. 761.
(3) 11 Q. B. D. 503.
(4) [1905] 1 K. B. 253.
(5) 106 L. T. 533.
(6) L. R. 5 Ex. 1.
(7) 11 Q. B. D. 503, 509.
(8) 6 N. Y. 397.

was held responsible to a third party injured by his neglect. It appears to me that the decision might well rest on the principle that he, in fact, sold a drug dangerous in itself, none the less so because he was asked to sell something else, and on this view the case does not advance the matter.

In another case of *MacPherson* v. *Buick Motor Co.* (1), where a manufacturer of a defective motor-car was held liable for damages at the instance of a third party, the learned judge appears to base his judgment on the view that a motor-car might reasonably be regarded as a dangerous article.

In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate purchaser are ex hypothesi immaterial. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognized, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that, with the exception of *George* v. *Skivington* (1), no case directly involving the principle has ever succeeded in the Courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been waste of time, and the distinction as to articles dangerous in themselves or known to be dangerous to the vendor would be meaningless.

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(1) (1916) 217 N. Y. 382.

In *Mullen* v. *Barr & Co.* (2), a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

LORD ATKIN. My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law; and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

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(1) L. R. 5 Ex. 1.

(2) 1929 S. C. 461, 479.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Atkin.

In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven* v. *Pender* (1), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* (1),

'neighbour principle

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(1) 11 Q. B. D. 503, 509.

H. L. (Sc.)
1932
DONOGHUE v. STEVENSON.
Lord Atkin.

as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre* v. *Gould.* (1) Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of *Heaven* v. *Pender* (2) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven* v. *Pender* (3) of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in *Le Lievre* v. *Gould* (1), I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven* v. *Pender* (2) were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

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(1) [1893] 1 Q. B. 491, 497, 504.

(2) 11 Q. B. D. 503, 509.

(3) 11 Q. B. D. 503, 510.

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(1) [1893] 1 Q. B. 491.
(2) 11 Q. B. D. 503.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George* v. *Skivington.* (1) That was a decision on a demurrer to a declaration which averred that the defendant professed to sell a hairwash made by himself, and that the plaintiff Joseph George bought a bottle, to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. Kelly C.B. said that there was no question of warranty, but whether the chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it. "Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." Pigott and Cleasby BB. put their judgments on the same ground. I venture to think that Cotton L.J., in *Heaven* v. *Pender* (2), misinterprets Cleasby B.'s judgment in the reference to *Langridge* v. *Levy.* (3) Cleasby B. appears to me to make it plain that in his opinion the duty to take reasonable care can be substituted for the duty which existed in *Langridge* v. *Levy* (3) not to defraud. It is worth noticing that *George* v. *Skivington* (1) was referred to by Cleasby B. himself, sitting as a member of the Court of Exchequer Chamber in *Francis* v. *Cockrell* (4), and was recognized by him as based on an ordinary duty to take care. It was also affirmed by Brett M.R.

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(1) L. R. 5 Ex. 1.
(2) 11 Q. B. D. 517.
(3) 4 M. & W. 337.
(4) L. R. 5 Q. B. 501, 515.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Atkin.

in *Cunnington* v. *Great Northern Ry. Co.* (1), decided on July 2 at a date between the argument and the judgment in *Heaven* v. *Pender* (2), though, as in that case the Court negatived any breach of duty, the expression of opinion is not authoritative. The existence of the duty contended for is also supported by *Hawkins* v. *Smith* (3), where a dock labourer in the employ of the dock company was injured by a defective sack which had been hired by the consignees from the defendant, who knew the use to which it was to be put, and had been provided by the consignees for the use of the dock company, who had been employed by them to unload the ship on the dock company's premises. The Divisional Court, Day and Lawrance JJ., held the defendant liable for negligence. Similarly, in *Elliott* v. *Hall* (4), the defendants, colliery owners, consigned coal to the plaintiff's employers, coal merchants, in a truck hired by the defendants from a wagon company. The plaintiff was injured in the course of unloading the coal by reason of the defective condition of the truck, and was held by a Divisional Court, Grove and A. L. Smith JJ., entitled to recover on the ground of the defendants' breach of duty to see that the truck was not in a dangerous condition. It is to be noticed that in neither case was the defective chattel in the defendants' occupation, possession or control, or on their premises, while in the latter case it was not even their property. It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground, but rather upon the knowledge that the plaintiff in the course of the contemplated use of the chattel would use it; and the supposed invitation appears to me to be in many cases a fiction, and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care. A very recent case which has the authority of this House is *Oliver* v. *Saddler & Co.* (5) In that case a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle, and then transported to the dockside by the shore porters, of whom the plaintiff was one. The porters relied on examination by the stevedores and had themselves no opportunity of examination. In these circumstances this House, reversing the decision of the First Division, held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use, and restored the judgment of the Lord Ordinary, Lord Morison, in favour of the pursuer. I find no trace of the doctrine of invitation in the opinions expressed in this House, of which mine was one: the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.

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(1) (1883) 49 L. T. 392.
(2) 11 Q. B. D. 517.
(3) (1896) 12 Times L. R. 532.
(4) (1885) 15 Q. B. D. 315.
(5) [1929] A. C. 584.

I should not omit in this review of cases the decision in *Grote* v. *Chester and Holyhead Ry.* (1) That was an action on the case in which it was alleged that the defendants had constructed a bridge over the Dee on their railway and had licensed the use of the bridge to the Shrewsbury and Chester Railway to carry passengers over it, and had so negligently constructed the bridge that the plaintiff, a passenger of the last named railway, had been injured by the falling of the bridge. At the trial before Vaughan Williams J. the judge had directed the jury that the plaintiff was entitled to recover if the bridge was not constructed with reasonable care and skill. On a motion for a new trial the Attorney-General (Sir John Jervis) contended that there was misdirection, for the defendants were only liable for negligence, and the jury might have understood that there was an absolute liability. The Court of Exchequer, after consulting the trial judge as to his direction, refused the rule. This case is said by Kelly C.B., in *Francis* v. *Cockrell* (2) in the Exchequer Chamber, to have been decided upon an implied contract with every person lawfully using the bridge that it was

(1) (1848) 2 Ex. 251. (2) L. R. 5 Q. B. 505.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Atkin.

reasonably fit for the purpose. I can find no trace of such a ground in the pleading or in the argument or judgment. It is true that the defendants were the owners and occupiers of the bridge. The law as to the liability to invitees and licensees had not then been developed. The case is interesting, because it is a simple action on the case for negligence, and the Court upheld the duty to persons using the bridge to take reasonable care that the bridge was safe.

It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this.

In *Dixon* v. *Bell* (1), the defendant had left a loaded gun at his lodgings and sent his servant, a mulatto girl aged about thirteen or fourteen, for the gun, asking the landlord to remove the priming and give it her. The landlord did remove the priming and gave it to the girl, who later levelled it at the plaintiff's small son, drew the trigger and injured the boy. The action was in case for negligently entrusting the young servant with the gun. The jury at the trial before Lord Ellenborough had returned a verdict for the plaintiff. A motion by Sir William Garrow (Attorney-General) for a new trial was dismissed by the Court, Lord Ellenborough and Bayley J., the former remarking that it was incumbent on the defendant, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious.

In *Langridge* v. *Levy* (2) the action was in case, and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea not guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe; whether it was in fact unsafe; and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise, and the plaintiff is injured by reason of its breach; by this is meant apparently that the duty need not be owed to the plaintiff, but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the Court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him; see per Parke B. (1) The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the Court as one of the acts contemplated by the fraudulent defendant. It is unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion. *Winterbottom* v. *Wright* (2) was a case decided on a demurrer. The plaintiff had demurred to two of the pleas, as to which there was no decision by the Court; but on the hearing of the plaintiff's demurrer the Court, in accordance with the practice of the day, were entitled to consider the whole record, including the declaration, and, coming to the conclusion that this declaration disclosed no cause of action, gave judgment for the defendant: see Sutton's Personal Actions at Common Law, p. 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case, and alleged that the defendant had contracted with the Postmaster-General to provide the mail-coach to convey

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(1) 5 M. & S. 198.

(2) 2 M. & W. 519; 4 M. & W. 337.

(1) 2 M. & W. 531.

(2) 10 M. & W. 109.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Atkin.

mails from Hartford to Holyhead and to keep the mails in safe condition; that Atkinson and others, with notice of the said contract, had contracted with the Postmaster-General to convey the road mail-coach from Hartford to Holyhead; and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail-coach; but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that the defendant, having the means of knowing, and well knowing, all the aforesaid premises, the mail-coach, being in a dangerous condition, owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged—in other words, no duty was alleged other than the duty arising out of the contract; it is not stated that the defendant knew, or ought to have known, of the latent defect. The argument of the defendant was that, on the face of the declaration, the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of Alderson and Rolfe BB. There are dicta by Lord Abinger which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right; no duty to the plaintiff arose out of the contract; and the duty of the defendant under the contract with the Postmaster-General to put the coach in good repair could not have involved such direct relations with the servant of the persons whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant. We now come to *Longmeid* v. *Holliday* (1), the dicta in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the plaintiff, Frederick Longmeid, had bought from the defendant, the maker and seller of "the Holliday lamp," a lamp to be used by himself and his wife Eliza in the plaintiff's shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said warranty, lighted the lamp, which exploded, whereby she was injured. It is perhaps not an extravagant guess to suppose that the plaintiffs' pleader had read the case of *Langridge* v. *Levy*. (1) The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by Martin B. for the plaintiff, but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained, plaintiff's counsel sought to support the verdict on the ground that this was not an action for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud. Parke B., who delivered the judgment of the Court, held that, fraud having been negatived, the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon, or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun, and refers to *Dixon* v. *Bell* (2), though what this case has to do with contract it is difficult to see. He then goes on: "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous—a carriage for instance—but which might become so by a latent defect entirely unknown although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable

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(1) 6 Ex. 761.

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(1) 2 M. & W. 519; 4 M. & W. 337.

(2) 5 M. & S. 198.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Atkin.

to the latter for a subsequent damage accruing by the use of it." It is worth noticing how guarded this dictum is. The case put is a machine such as a carriage, not in its nature dangerous, which might become dangerous by a latent defect entirely unknown. Then there is the saving, "although discoverable by the exercise of ordinary care," discoverable by whom is not said; it may include the person to whom the innocent machine is "lent or given." Then the dictum is confined to machines "lent or given" (a later sentence makes it clear that a distinction is intended between these words and "delivered to the purchaser under the contract of sale"), and the manufacturer is introduced for the first time, "even by the person who manufactured it." I do not for a moment believe that Parke B. had in his mind such a case as a loaf negligently mixed with poison by the baker which poisoned a purchaser's family. He is, in my opinion, confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party, and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or mediate effect upon the consumer. It is noteworthy that he only refers to "letting or giving" chattels, operations known to the law, where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care. Next in this chain of authority come *George* v. *Skivington* (1) and *Heaven* v. *Pender* (2), which I have already discussed. The next case is *Earl* v. *Lubbock*. (3) The plaintiff sued in the county court for personal injuries due to the negligence of the defendant. The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned county court

(1) L. R. 5 Ex. 1.
(2) 11 Q. B. D. 503.
(3) [1905] 1 K. B. 253.

judge had held that the defendant owed no duty to the plaintiff, and the Divisional Court (Lord Alverstone L.C.J., Wills and Kennedy JJ.) and the Court of Appeal agreed with him. The Master of the Rolls, Sir R. Henn Collins, said that the case was concluded by *Winterbottom* v. *Wright.* (1) In other words, he must have treated the duty as alleged to arise only from a breach of contract; for, as has been pointed out, that was the only allegation in *Winterbottom* v. *Wright* (1), negligence apart from contract being neither averred nor proved. It is true that he cites with approval the dicta of Lord Abinger in that case; but obviously I think his approval must be limited to those dicta so far as they related to the particular facts before the Court of Appeal, and to cases where, as Lord Abinger says, the law permits a contract to be turned into a tort. Stirling L.J., it is true, said that to succeed the plaintiff must bring his case within the proposition of the majority in *Heaven* v. *Pender* (2), that any one who, without due warning, supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture to think that the Lord Justice is mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion.

Mathew L.J. appears to me to put the case on its proper footing when he says (3) the argument of the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that any one in this employment had a cause of action against the defendant. "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on." I entirely agree. I have no doubt that in that case the plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different from that raised in the present case. The case of *Blacker* v. *Lake & Elliot, Ld.* (4), approaches more nearly the facts of this case. I have read and re-read

(1) 10 M. & W. 109.
(2) 11 Q. B. D. 503.
(3) [1905] 1 K. B. 259.
(4) 106 L. T. 533.

it, having unfeigned respect for the authority of the two learned judges, Hamilton and Lush JJ., who decided it, and I am bound to say I have found difficulty in formulating the precise grounds upon which the judgment was given. The plaintiff had been injured by the bursting of a brazing lamp which he had bought from a shopkeeper who had bought it from the manufacturer, the defendant. The plaintiff had used the lamp for twelve months before the accident. The case was tried in the county court before that excellent lawyer the late Sir Howland Roberts. That learned judge had directed the jury that the plaintiff could succeed if the defendants had put upon the market a lamp not fit for use in the sense that a person working it with reasonable care would incur a risk which a properly constructed lamp would not impose upon him. The jury found that the lamp was defective by reason of an improper system of making an essential joint between the container and the vaporizer; that the defendants did not know that it was dangerous, but ought as reasonable men to have known it. Hamilton J. seems to have thought that there was no evidence of negligence in this respect. Lush J. expressly says so and implies—" I also think "—that Hamilton J. so thought. If so, the case resolves itself into a series of important dicta. Hamilton J. says (1) that it has been decided in authorities from *Winterbottom* v. *Wright* (2) to *Earl* v. *Lubbock* (3) that the breach of the defendants' contract with A., to use care and skill in and about the manufacture or repair of an article, does not itself give any cause of action to B. when injured by the article proving to be defective in breach of that contract. He then goes on to say, how is the case of the plaintiffs any better when there is no contract proved of which there could be a breach. I think, with respect, that this saying does not give sufficient weight to the actual issues raised by the pleadings on which alone the older cases are an authority. If the issue raised was an alleged duty created by contract, it would have been

(1) 106 L. T. 536.
(2) 10 M. & W. 109.
(3) [1905] 1 K. B. 253.

irrelevant to consider duties created without reference to contract; and contract cases cease to be authorities for duties alleged to exist beyond or without contract. Moreover, it is a mistake to describe the authorities as dealing with the failure of care or skill in the manufacture of goods, as contrasted with repair. The only manufacturing case was *Longmeid* v. *Holliday* (1), where negligence was not alleged. Hamilton J. recognizes that *George* v. *Skivington* (2) was a decision which, if it remained an authority, bound him. He says that, without presuming to say it was wrong, he cannot follow it, because it is in conflict with *Winterbottom* v. *Wright.* (3) I find this very difficult to understand, for *George* v. *Skivington* (2) was based upon a duty in the manufacturer to take care independently of contract, while *Winterbottom* v. *Wright* (3) was decided on demurrer in a case where the alleged duty was based solely on breach of a contractual duty to keep in repair, and no negligence was alleged. Lush J. says in terms that there are only three classes of cases in which a stranger to a contract can sue for injury by a defective chattel: one is that of fraud; the second of articles dangerous or noxious in themselves, where the duty is only to warn; the third of public nuisance. He does not bring the cases represented by *Elliott* v. *Hall* (4) (the defective coal wagon) within his classes at all. He says they belong to a totally different class, "where the control of premises or the management of a dangerous thing upon premises creates a duty." I have already pointed out that this distinction is unfounded in fact, for in *Elliott* v. *Hall* (4), as in *Hawkins* v. *Smith* (5) (the defective sack), the defendant exercised no control over the article and the accident did not occur on his premises. With all respect, I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed

(1) 6 Ex. 761.
(2) L. R. 5 Ex. 1.
(3) 10 M. & W. 109.
(4) 15 Q. B. D. 315.
(5) 12 Times L. R. 532.

to those who will be immediately injured by lack of care. The last case I need refer to is *Bates* v. *Batey & Co., Ld.* (1), where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle was defective or not. Horridge J. found that a bottle of ginger-beer was not dangerous in itself, but this defective bottle was in fact dangerous; but, as the defendants did not know that it was dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle; but, on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing. I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton L.J. in *Hodge & Sons* v. *Anglo-American Oil Co.* (2), a case which was ultimately decided on a question of fact. "Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In the *Dominion Natural Gas Co., Ld.* v. *Collins and Perkins* (1) the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape-valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee (consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson), after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded: "There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity." This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous; it is only when the gun is loaded or the apparatus charged with gas that the danger arises. I do not think it necessary to consider the obligation of a person who entrusts to a carrier goods which are dangerous or which he ought to know are dangerous. As far as the direct obligation of the consignor to the carrier is concerned, it has been put upon an implied warranty: *Brass* v. *Maitland* (1); but it is also a duty owed independently of contract, e.g., to the carrier's servant: *Farrant* v. *Barnes*. (2) So far as the cases afford an analogy they seem to support the proposition now asserted. I need only mention to distinguish two cases in this House which are referred to in some of the cases which I have reviewed. *Caledonian Ry. Co.* v. *Mulholland or Warwick* (3), in which the appellant company were held not liable for injuries caused by a defective brake on a coal wagon conveyed by the railway company to a point in the transit where their contract ended, and where the wagons were taken over for haulage for the last part of the journey by a second railway company, on which part the accident happened. It was held that the first railway company were under no duty to the injured workmen to examine the wagon for defects at the end of their contractual haulage. There was ample opportunity for inspection by the second railway company. The relations were not proximate. In the second (*Cavalier* v. *Pope* (4)), the wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract, and that the well known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

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(1) [1913] 3 K. B. 351.

(2) (1922) 12 Ll. L. Rep. 183, 187.

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(1) [1909] A. C. 640, 646.

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(1) (1856) 6 E. & B. 470.
(2) (1862) 11 C. B. (N. S.) 553, 563.
(3) [1898] A. C. 216.
(4) [1906] A. C. 428.

H. L. (Sc.)
1932

DONOGHUE
v.
STEVENSON.

Lord Atkin.

In the most recent case (*Bottomley* v. *Bannister* (1)), an action under Lord Campbell's Act, the deceased man, the father of the plaintiff, had taken an unfurnished house from the defendants, who had installed a gas boiler with a special gas-burner which if properly regulated required no flue. The deceased and his wife were killed by fumes from the apparatus. The case was determined on the gound that the apparatus was part of the realty and that the landlord did not know of the danger; but there is a discussion of the case on the supposition that it was a chattel. Greer L.J. states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care, then in cases of a proximate relationship the present case will, I trust, supply the deficiency.

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *MacPherson* v. *Buick Motor Co.* in the New York Court of Appeals (2), in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

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(1) [1932] 1 K. B. 458; (1932) 101 L. J. (K. B.) 46, 54.

(2) 217 N. Y. 382.

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Atkin's RATIO D. – Narrow PRINCIPLE

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

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LORD TOMLIN. My Lords, I have had an opportunity of considering the opinion (which I have already read) prepared by my noble and learned friend, Lord Buckmaster. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to every one who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty; it is only a factor which may render it easier to bring negligence home to the manufacturer.

Secondly, I desire to say that in my opinion the decision in *Winterbottom* v. *Wright* (1) is directly in point against the appellant.

The examination of the report makes it, I think, plain (1.) that negligence was alleged and was the basis of the claim, and (2.) that the wide proposition which I have indicated was that for which the plaintiff was contending.

The declaration averred (inter alia) that the defendant "so improperly and negligently conducted himself" that the accident complained of happened.

The plaintiff's counsel said: "Here the declaration alleges the accident to have happened through the defendant's negligence and want of care."

The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle."

That the action, which was in case, embraced a cause of action in tort is, I think, implicit in its form, and appears from the concluding sentence of Lord Abinger's judgment, which was in these terms: "By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him."

I will only add to what has been already said by my noble and learned friend, Lord Buckmaster, with regard to the decisions and dicta relied upon by the appellant and the other relevant reported cases, that I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases —some directly, others impliedly—negative the existence as part of the common law of England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

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(1) 10 M. & W. 109.

LORD THANKERTON. My Lords, in this action the appellant claims reparation from the respondent in respect of illness and other injurious effects resulting from the presence of a decomposed snail in a bottle of ginger-beer, alleged to have been manufactured by the respondent, and which was partially consumed by her, it having been ordered by a friend on her behalf in a café in Paisley.

The action is based on negligence, and the only question in this appeal is whether, taking the appellant's averments pro veritate, they disclose a case relevant in law so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but on a reclaiming note for the respondent the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of *Mullen* v. *Barr & Co.* and *M'Gowan* v. *Barr & Co.* (1)

The appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption, if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label containing the name and address of the respondent, who was the manufacturer. She states that the shopkeeper, who supplied the ginger-beer, opened it and poured some of its contents into a tumbler, which contained some ice-cream, and that she drank some of the contents of the tumbler; that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler when a snail, which had been, unknown to her, her friend, or the shopkeeper, in the bottle, and was in a state of decomposition, floated out of the bottle.

(1) 1929 S. C. 461.

The duties which the appellant accuses the respondent of having neglected may be summarized as follows (*a*) That the ginger-beer was manufactured by the respondent or his servants to be sold as an article of drink to members of the public (including the appellant), and that accordingly it was his duty to exercise the greatest care in order that snails would not get into the bottles, render the ginger-beer dangerous and harmful, and be sold with the ginger-beer; (*b*) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and in particular would not allow the bottles when washed to stand in places to which snails had access; (*c*) a duty to provide an efficient system of inspection which would prevent snails from getting into the sealed bottles; and (*d*) a duty to provide clear bottles so as to facilitate the said system of inspection.

There can be no doubt, in my opinion, that equally in the law of Scotland and of England it lies upon the party claiming redress in such a case to show that there was some relation of duty between her and the defender which required the defender to exercise due and reasonable care for her safety. It is not at all necessary that there should be any direct contract between them, because the action is not based upon contract, but upon negligence; but it is necessary for the pursuer in such an action to show there was a duty owed to her by the defender, because a man cannot be charged with negligence if he has no obligation to exercise diligence: *Kemp & Dougall* v. *Darngavil Coal Co.* (1), per Lord Kinnear; see also *Clelland* v. *Robb* (2), per Lord President Dunedin and Lord Kinnear. The question in each case is whether the pursuer has established, or in the stage of the present appeal has relevantly averred, such facts as involve the existence of such a relation of duty.

We are not dealing here with a case of what is called an article per se dangerous, or one which was known by the defender to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it. The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American Courts, in the decisions referred to by my noble and learned friend, Lord Macmillan, have taken a view more favourable to the consumer.

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(1) 1909 S. C. 1314, 1319.

(2) 1911 S. C. 253, 256.

The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus—namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact and that she has been injured by the harmful nature of the article, owing to the failure of the manufacturer to take reasonable care in its preparation prior to its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer.

In my opinion, the existence of a legal duty under such circumstances is in conformity with the principles of both the law of Scotland and of the law of England. The English cases demonstrate how impossible it is to catalogue finally, amid the ever varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen. In none of these cases were the circumstances identical with the present case as regards that which I regard as the essential element in this case—namely, the manufacturer's own action in bringing himself into direct relationship with the party injured. I have had the privilege of considering the discussion of these authorities by my noble and learned friend, Lord Atkin, in the judgment which he has just delivered, and I so entirely agree with it that I cannot usefully add anything to it.

An interesting illustration of similar circumstances is to be found in *Gordon* v. *M'Hardy* (1), in which the pursuer sought to recover damages from a retail grocer on account of the death of his son by ptomaine poisoning, caused by eating tinned salmon purchased from the defender. The pursuer averred that the tin, when sold, was dented, but he did not suggest that the grocer had cut through the metal and allowed air to get in, or had otherwise caused injury to the contents. The action was held irrelevant, the Lord Justice-Clerk remarking: "I do not see how the defender could have examined the tin of salmon which he is alleged to have sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the tin not being intended to be opened until immediately before use." Apparently in that case the manufacturers' label was off the tin when sold, and they had not been identified. I should be sorry to think that the meticulous care of the manufacturer to exclude interference or inspection by the grocer in that case should relieve the grocer of any responsibility to the consumer without any corresponding assumption of duty by the manufacturer.

My Lords, I am of opinion that the contention of the appellant is sound, and that she has relevantly averred a relationship of duty as between the respondent and herself, as also that her averments of the respondent's neglect of that duty are relevant.

The cases of *Mullen* and *M'Gowan* (2), which the learned judges of the Second Division followed in the present case, related to facts similar in every respect except that the foreign matter was a decomposed mouse. In these cases the same Court (Lord Hunter dissenting) held that the manufacturer owed no duty to the consumer. The view of the majority was that the English authorities excluded the existence of such a duty, but Lord Ormidale (1) would otherwise have been prepared to come to a contrary conclusion. Lord Hunter's opinion seems to be in conformity with the view I have expressed above.

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(1) (1903) 6 F. 210.

(2) 1929 S. C. 461.

My conclusion rests upon the facts averred in this case and would apparently also have applied in the cases of *Mullen* and *M'Gowan* (2), in which, however, there had been a proof before answer, and there was also a question whether the pursuers had proved their averments.

I am therefore of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

Lord Macmillan. My Lords, the incident which in its legal bearings your Lordships are called upon to consider in this appeal was in itself of a trivial character, though the consequences to the appellant, as she describes them, were serious enough. It appears from the appellant's allegations that on an evening in August, 1928, she and a friend visited a café in Paisley, where her friend ordered for her some ice-cream and a bottle of ginger-beer. These were supplied by the shopkeeper, who opened the ginger-beer bottle and poured some of the contents over the ice-cream, which was contained in a tumbler. The appellant drank part of the mixture, and her friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger-beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleges that she contracted a serious illness. The bottle is stated to have been of dark opaque glass, so that the condition of the contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger-beer of which the shopkeeper was merely the retailer.

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(1) 1929 S. C. 471.

(2) 1929 S. C. 461.

The allegations of negligence on which the appellant founds her action against the respondent may be shortly summarized. She says that the ginger-beer was manufactured by the respondent for sale as an article of drink to members of the public, including herself; that the presence of a decomposing snail in ginger-beer renders the ginger-beer harmful and dangerous to those consuming it; and that it was the duty of the respondent to exercise his process of manufacture with sufficient care to prevent snails getting into or remaining in the bottles which he filled with ginger-beer. The appellant attacks the respondent's system of conducting his business, alleging that he kept his bottles in premises to which snails had access, and that he failed to have his bottles properly inspected for the presence of foreign matter before he filled them.

The respondent challenged the relevancy of the appellant's averments, and taking them pro veritate, as for this purpose he was bound to do, pleaded that they disclosed no ground of legal liability on his part to the appellant.

The Lord Ordinary repelled the respondent's plea to the relevancy and allowed the parties a proof of their averments, but on a reclaiming note their Lordships of the Second Division (Lord Hunter dissenting, or, perhaps more accurately, protesting) dismissed the action, and in doing so followed their decision in the previous cases of *Mullen* v. *Barr & Co.* and *M'Gowan* v. *Barr & Co.* (1) The only difference in fact between those cases and the present case is that it was a mouse and not a snail which was found in the ginger-beer. The present appeal is consequently in effect against the decision in these previous cases, which I now proceed to examine.

The two cases, being to all intents and purposes identical, were heard and decided together. In *Mullen* v. *Barr & Co.* (1) the Sheriff-Substitute allowed a proof, but the Sheriff, on appeal, dismissed the action as irrelevant. In *M'Gowan* v. *Barr & Co.* (1) the Sheriff-Substitute allowed a proof and the Sheriff altered his interlocutor by allowing a proof before

(1) 1929 S. C. 461.

answer—that is to say, a proof under reservation of all objections to the relevancy of the action. On the cases coming before the Second Division on the appeals of the pursuer and the defenders respectively their Lordships ordered a proof before answer in each case, and the evidence was taken before Lord Hunter. It will be sufficient to refer to *Mullen's* case (1), in which their Lordships gave their reasons for assoilzieing the defenders in both cases. The Lord Justice-Clerk held that negligence had not been proved, and therefore did not pronounce upon the question of relevancy. Lord Ormidale held that there was no relevant case against the defenders, but would have been prepared, if necessary, to hold that in any case negligence had not been established by the evidence. Lord Hunter held that the case was relevant and that negligence had been proved. Lord Anderson held that the pursuer had no case in law against the defenders, but that if this view was erroneous negligence had not been proved.

I desire to draw special attention to certain passages in the opinions of their Lordships. The learned Lord Justice-Clerk states (2) that he prefers "to base his judgment on the proposition that the pursuer has failed to prove fault on the part of the defenders," and feels "absolved from expressing a concluded opinion on the thorny and difficult question of law whether, assuming fault to be proved on the part of the defenders, the pursuer has in law a right to sue them." In the present case his Lordship, after pointing out that he had formally reserved his opinion on the point in *Mullen* v. *Barr & Co.* (1), proceeds: "I think I indicated, not obscurely, the view which I entertained on a perusal of the English cases," and to that view, in deference to the English cases which his Lordship has reconsidered, he has given effect adversely to the present appellant. That the opinions of the majority of the judges of the Second Division in *Mullen's* case (1) on the question of relevancy are founded entirely on their reading of the series of English cases cited to them is made clear by Lord Ormidale. After stating the questions in the case, the first being "whether, in the absence of any contractual relation between the

(1) 1929 S. C. 461.

(2) 1929 S. C. 470.

pursuers and the defenders, the latter owed a duty to the pursuers, as the consumers of the beer, of taking precautions to see that nothing of a poisonous or deleterious nature was allowed to enter and remain in the bottles," his Lordship proceeds: "I recognize the difficulty of determining the first of these questions with either confidence or satisfaction; and were it not for the unbroken and consistent current of decisions beginning with *Winterbottom* v. *Wright* (1), to which we were referred, I should have been disposed to answer it in the affirmative. The evidence shows that the greatest care is taken by the manufacturers to ensure by tab and label that the ginger-beer should pass, as it were, from the hand of the maker to the hand of the ultimate user uninterfered with by the retail dealer—who has little interest in, and no opportunity of, examining the contents of the containers. Accordingly it would appear to be reasonable and equitable to hold that, in the circumstances and apart altogether from contract, there exists a relationship of duty as between the maker and the consumer of the beer. Such considerations, however, as I read the authorities, have been held to be irrelevant in analogous circumstances." Lord Ormidale thus finds himself constrained to reach a conclusion which appears to him to be contrary to reason and equity by his reading of what he describes as an "unbroken and consistent current of decisions beginning with *Winterbottom* v. *Wright*." (1) In view of the deference thus paid to English precedents, it is a singular fact that the case of *Winterbottom* v. *Wright* (1) is one in which no negligence in the sense of breach of a duty owed by the defendant to the plaintiff was alleged on the part of the plaintiff. The truth, as I hope to show, is that there is in the English reports no such "unbroken and consistent current of decisions" as would justify the aspersion that the law of England has committed itself irrevocably to what is neither reasonable nor equitable, or require a Scottish judge in following them to do violence to his conscience. "In my opinion," said Lord Esher, in *Emmens* v. *Pottle* (2), "any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England."

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(1) 10 M. & W. 109.

(2) (1885) 16 Q. B. D. 354, 357, 358.

At your Lordships' Bar counsel for both parties to the present appeal, accepting, as I do also, the view that there is no distinction between the law of Scotland and the law of England in the legal principles applicable to the case, confined their arguments to the English authorities. The appellant endeavoured to establish that according to the law of England the pleadings disclose a good cause of action; the respondent endeavoured to show that on the English decisions the appellant had stated no admissible case. I propose therefore to address myself at once to an examination of the relevant English precedents.

I observe, in the first place, that there is no decision of this House upon the point at issue, for I agree with Lord Hunter that such cases as *Cavalier* v. *Pope* (1) and *Cameron* v. *Young* (2), which decided that "a stranger to a lease cannot found upon a landlord's failure to fulfil obligations undertaken by him under contract with his lessee," are in a different chapter of the law. Nor can it by any means be said that the cases present "an unbroken and consistent current" of authority, for some flow one way and some the other.

It humbly appears to me that the diversity of view which is exhibited in such cases as *George* v. *Skivington* (3) on the one hand and *Blacker* v. *Lake & Elliot, Ld.* (4), on the other hand —to take two extreme instances—is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject. "It appears," says Sir Frederick Pollock, Law of Torts, 13th ed., p. 570, "that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. The authorities formerly relied on for this proposition really proved something different and much more rational, namely, that if A. breaks his contract with B. (which may happen without any personal default in A. or A.'s servants), that is not of itself sufficient to make A. liable to C., a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decisions of the Court of Exchequer in *Winterbottom* v. *Wright* (1) and *Longmeid* v. *Holliday*. (2) In each case the defendant delivered, under a contract of sale or hiring, a chattel which was in fact unsafe to use, but in the one case it was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract, using the chattel—a coach in the one case, a lamp in the other—in the ordinary way, came to harm through its dangerous condition, and was held not to have any cause of action against the purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved."

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(1) [1906] A. C. 428.
(2) [1908] A. C. 176; 1908 S. C. (H. L.) 7.
(3) L. R. 5 Ex. 1.
(4) 106 L. T. 533.

(1) 10 M. & W. 109.

(2) 6 Ex. 761.

Where, as in cases like the present, so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if he is to succeed, is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer, and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant, and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to nonsuit the appellant. It will be found that in most of them the facts were very different from the facts of the present case, and did not give rise to the special relationship, and consequent duty, which in my opinion is the deciding factor here. *Dixon* v. *Bell* (1) is the starting-point. There a maid-servant was sent to fetch a gun from a neighbour's house; on the way back she pointed it at a child, and the gun went off and injured the child. The owner of the gun was held liable for the injury to the child on the ground that he should have seen that the charge was drawn before he entrusted the gun to the maid-servant. "It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious." This case, in my opinion, merely illustrates the high degree of care, amounting in effect to insurance against risk, which the law extracts from those who take the responsibility of giving out such dangerous things as loaded firearms. The decision, if it has any relevance, is favourable to the appellant, who submits that human drink rendered poisonous by careless preparation may be as dangerous to life as any loaded firearm. *Langridge* v. *Levy* (2) is another case of a gun, this time of defective make and known to the vendor to be defective. The purchaser's son was held entitled to sue for damages in consequence of injuries sustained by him through the defective condition of the gun causing it to explode. The ground of the decision seems to have been that there was a false representation by the vendor that the gun was safe, and the representation appears to have been held to extend to the purchaser's son. The case is treated by commentators as turning on its special circumstances, and as not deciding any principle of general application. As for *Winterbottom* v. *Wright* (1) and *Longmeid* v. *Holliday* (2), neither of these cases is really in point, for the reason indicated in the passage from Sir Frederick Pollock's treatise which I have quoted above. Then comes *George* v. *Skivington* (3), which is entirely in favour of the appellant's contention. There was a sale in that case by a chemist of some hairwash to a purchaser for the use of his wife, who suffered injury from using it by reason of its having been negligently compounded. As Kelly C.B. points out, the action was not founded on any warranty implied in the contract of sale between the vendor and the purchaser; and the plaintiff, the purchaser's wife, was not seeking to sue on the contract to which she was not a party. The question, as the Chief Baron stated it, was "whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured." And this question the Court unanimously answered in the affirmative. I may mention in passing that Lord Atkinson in this House, speaking of that case and of *Langridge* v. *Levy* (4), observed that: "In both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used and the party injured was ignorant of its unfitness for these purposes": *Cavalier* v. *Pope*. (5) It is true that *George* v. *Skivington* (3) has been the subject of some criticism, and was said by Hamilton J., as he then was, in *Blacker* v. *Lake & Elliot, Ld.* (6), to have been in later cases as nearly disaffirmed as is possible without being expressly overruled. I am not sure that it has been so severely handled as that. At any rate I do not think that it deserved to be, and certainly, so far as I am aware, it has never been disapproved in this House.

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(1) 5 M. & S. 198.

(2) 2 M. & W. 519; 4 M. & W. 337.

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(1) 10 M. & W. 109.

(2) 6 Ex. 761.

(3) L. R. 5 Ex. 1.

(4) 2 M. & W. 519; 4 M. & W. 337.

(5) [1906] A. C. at p. 433.

(6) 106 L. T. 533.

Heaven v. *Pender* (1) has probably been more quoted and discussed in this branch of the law than any other authority, because of the dicta of Brett M.R., as he then was, on the general principles regulating liability to third parties. In his opinion "it may, therefore, safely be affirmed to be a true proposition" that "whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The passage specially applicable to the present case is as follows (2): "Whenever one person supplies goods . . . . for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence." Cotton L.J., with whom Bowen L.J. agreed, expressed himself (3) as "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived," but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism, and their universality may require some qualification, but as enunciations of general legal doctrine I am prepared, like Lord Hunter, to accept them as sound guides. I now pass to the three modern cases of *Earl* v.

(1) 11 Q. B. D. 503.

(2) 11 Q. B. D. 510.

(3) 11 Q. B. D. 516.

Lubbock (1); *Blacker* v. *Lake & Elliot, Ld.* (2); and *Bates* v. *Batey & Co., Ld.* (3) The first of these cases related to a van which had recently been repaired by the defendant under contract with the owner of the van. A driver in the employment of the owner was injured in consequence of a defect in the van which was said to be due to the careless manner in which the repairer had done his work. It was held that the driver had no right of action against the repairer. The case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It was pointed out that there was no evidence that the plaintiff had been invited by the defendant to use the van, and the van owner was not complaining of the way in which the van had been repaired. The negligence, if negligence there was, was too remote, and the practical consequences of affirming liability in such a case were considered to be such as would render it difficult to carry on a trade at all. "No prudent man," says Mathew L.J., "would contract to make or repair what the employers intended to permit others to use in the way of his trade." The species facti in that case seems to me to differ widely from the circumstances of the present case, where the manufacturer has specifically in view the use and consumption of his products by the consumer, and where the retailer is merely the vehicle of transmission of the products to the consumer, and by the nature of the products is precluded from inspecting or interfering with them in any way. The case of *Blacker* v. *Lake & Elliot, Ld.* (2), is of importance because of the survey of previous decisions which it contains. It related to a brazing lamp which, by exploding owing to a latent defect, injured a person other than the purchaser of it, and the vendor was held not liable to the party injured. There appears to have been some difference of opinion between Hamilton J. and Lush J., who heard the case in the Divisional Court, as to whether the lamp was an inherently dangerous thing. The case seems to have turned largely on the question whether, there being a contract of sale of the lamp between the vendor and the purchaser, the article was of such a dangerous character as to impose upon the vendor, in a question with a third party, any responsibility for its condition. This question was answered in the negative. So far as negligence was concerned, it may well have been regarded as too remote, for I find that Hamilton J. used these words: "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe, and had no reason to believe that it was not so, in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known." I should doubt indeed if that is really a finding of negligence at all. The case on its facts is very far from the present one; and if any principle of general application can be derived from it adverse to the appellant's contention, I should not be disposed to approve of such principle. I may add that in *White* v. *Steadman* (1) I find that Lush J., who was a party to the decision in *Blacker* v. *Lake & Elliot, Ld.* (2), expressed the view "that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows." As for *Bates* v. *Batey & Co., Ld.* (3), where a ginger-beer bottle burst, owing to a defect in it which, though unknown to the manufacturer of the ginger-beer, could have been discovered by him by the exercise of reasonable care, Horridge J. there held that the plaintiff, who bought the bottle of ginger-beer from a retailer to whom the manufacturer had sold it, and who was injured by its explosion, had no right of action against the manufacturer. The case does not advance matters, for it really turns upon the fact that the manufacturer did not know that the bottle was defective, and this, in the view of Horridge J., as he read the authorities, was enough to absolve the manufacturer. I would observe that, in a true case of negligence, knowledge of the existence of the defect causing damage is not an essential element at all.

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(1) [1905] 1 K. B. 253. (2) 106 L. T. 533, 537. (3) [1913] 3 K. B. 351.

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(1) [1913] 3 K. B. 340, 348.
(2) 106 L. T. 533.
(3) [1913] 3 K. B. 351.

This summary survey is sufficient to show, what more detailed study confirms, that the current of authority has by no means always set in the same direction. In addition to *George* v. *Skivington* (1) there is the American case of *Thomas* v. *Winchester* (2), which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued, in response to an order for extract of dandelion, a bottle containing belladonna which he labelled extract of dandelion, with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by Lord Dunedin, in giving the judgment of the Privy Council in *Dominion Natural Gas Co.* v. *Collins & Perkins* (3), as an instance of liability to third parties, and I think it was a sound decision.

In the American Courts the law has advanced considerably in the development of the principle exemplified in *Thomas* v. *Winchester*. (2) In one of the latest cases in the United States, *MacPherson* v. *Buick Motor Co.* (4), the plaintiff, who had purchased from a retailer a motor-car manufactured by the defendant company, was injured in consequence of a defect in the construction of the car, and was held entitled to recover damages from the manufacturer. Cardozo J., the very eminent Chief Judge of the New York Court of Appeals and now an Associate Justice of the United States Supreme Court, thus stated the law (5): "There is no claim that the defendant knew of the defect and wilfully concealed it. . . . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. . . . . The principle of *Thomas* v. *Winchester* (2) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements

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(1) L. R. 5 Ex. 1.
(2) 6 N. Y. 397.
(3) [1909] A. C. 640.
(4) 217 N. Y. 382.
(5) 217 N. Y. 385.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Macmillan.

of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. . . . . There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. . . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion."

The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I had forgotten that the present is a Scottish appeal which must be decided according to Scots law. But this discussion has been rendered inevitable by the course of the argument at your Lordships' Bar, which, as I have said, proceeded on the footing that the law applicable to the case was the same in England and Scotland. Having regard to the inconclusive state of the authorities in the Courts below and to the fact that the important question involved is now before your Lordships for the first time, I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Macmillan.

legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness," and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON.
Lord Macmillan.

do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

My Lords, the recognition by counsel that the law of Scotland applicable to the case was the same as the law of England implied that there was no special doctrine of Scots law which either the appellant or the respondent could invoke to support her or his case; and your Lordships have thus been relieved of the necessity of a separate consideration of the law of Scotland. For myself, I am satisfied that there is no specialty of Scots law involved, and that the case may safely be decided on principles common to both systems. I am happy to think that in their relation to the practical problem of everyday life which this appeal presents the legal systems of the two countries are in no way at variance, and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which appellant seeks to establish.

I am anxious to emphasize that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by Parke B. in *Longmeid* v. *Holliday* (1), where he said: " But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

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(1) 6 Ex. 761, 768.

H. L. (Sc.)
1932
DONOGHUE
v.
STEVENSON
Lord Macmillan.

I read this passage rather as a note of warning that the standard of care exacted in human dealings must not be pitched too high than as giving any countenance to the view that negligence may be exhibited with impunity. It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded. It is doubtful whether in such a case there is any redress against the retailer: *Gordon* v. *M'Hardy.* (1)

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, res ipsa loquitur. Negligence must be both averred and proved. The appellant accepts this burden of

(1) 6 F. 210.

proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay to the appellant the costs of the action in the Inner House and also the costs incurred by her in respect of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, May 26, 1932.

Agents for the appellant: *Horner & Horner, for W. G. Leechman & Co., Glasgow and Edinburgh.*

Agents for the respondent: *Lawrence Jones & Co., for Niven, Macniven & Co., Glasgow, and Macpherson & Mackay, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* HOLDER AND ANOTHER . . . . . . APPELLANTS;

1932

April 15.

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Income Tax—Interest payable on an Advance from a Bank—Guarantees of Company's Indebtedness to Bank—Payment by Guarantors of Total Indebtedness—Claim to Repayment of Income Tax on Part representing Interest—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.

By s. 36, sub-s. 1, of the Income Tax Act, 1918: "Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest."

Held, that, upon the true construction of the sub-section, interest payable on an advance from a bank meant interest on an advance made to the person paying the interest, and that the sub-section did not apply to a payment made by a guarantor of the advance under his guarantee.

Decision of the Court of Appeal [1931] 2 K. B. 81 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.) (1) reversing an order of Rowlatt J. whereby an appeal by the Crown upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the decision of the Commissioners was affirmed.

The case is set out in the report before the Court of Appeal and the facts sufficiently appear from the opinion of Viscount Dunedin.

The questions raised by the appeal related to a claim made by the appellants under s. 36, sub-s. 1, of the Income Tax Act, 1918, for repayment of income tax in respect of interest payable without deduction of tax upon advances

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

(1) [1931] 2 K. B. 81.

H. L. (E.)
1932
HOLDER
v.
INLAND
REVENUE
COMMISSIONERS.

made by a bank to a customer from time to time and were: (*a*) Whether the appellants, being persons who guaranteed the advances, could be said to have paid for the purposes of the sub-section interest upon an advance from a bank when called upon under their guarantees to pay to the bank the total sum made up of principal and interest due from the borrower to the lender, in view of the consideration that the debt of the guarantors was a debt under their guarantees only; and (*b*) whether, assuming the appellants could be said in law to pay interest under their guarantees, any part of the sum actually paid by them was in the circumstances a payment of interest (except as regards the interest accrued upon the advances in respect of the last half-year), in view of the consideration that by agreement between banker and customer and in accordance with ordinary banking practice the bank at the end of each half-year had added the accrued interest to the principal loan and had become entitled to treat it as a further advance to the customer upon which interest was payable, and had thus themselves received interest from the customer each half-year with the exception of the last.

The Court of Appeal decided both these questions against the appellants.

Upon the appeal to this House, as also in the Court of Appeal, the arguments of counsel were mainly addressed to question (*b*), but, in view of the fact that their Lordships did not think it necessary to determine this question, these arguments are not reported. They are fully reported in the previous report of the case.

1932. March 7, 8, 10 and 11. *W. P. Spens K.C.* and *Cyril L. King* for the appellants.

Sir Boyd Merriman S.-G. and *Reginald Hills* for the respondents.

The House took time for consideration.

April 15. VISCOUNT DUNEDIN. My Lords, the appellants were interested in a company called Blumfield, Ld. (hereinafter referred to as "the company"), which had for many years been indebted to its bankers.

The appellants, in some cases individually and in others jointly and severally, gave guarantees to the bank to secure the company's indebtedness.

The appellants undertook thereby "to pay and satisfy to the bank all and every the sum or sums of money which shall at any time be owing to the bank......................on any account........................together with..........................all interest, discount and other bankers' charges." The total liability ultimately enforceable against the guarantor or guarantors under each guarantee was limited to a definite sum.

From 1920 onwards, the company was continuously indebted to the bank and, in accordance with the usual custom of bankers, the interest on the amounts owing to the bank from time to time was debited half-yearly to the company's capital account with the bank. Though from time to time payments were made by the company into the account, the amount due to the bank increased each half-year save that ending December 31, 1924.

After being pressed by the bank to discharge the company's indebtedness, the appellants, on November 17, 1926, paid to the bank the sum due on the company's account, this sum being covered by the guarantees that had been given by the appellants. The sum paid by the appellants was 64,482*l*. 16*s*. 8*d*.

By examination of the bank accounts the appellants contend that it can be shown that, of this sum, 16,519*l*. 18*s*. 4*d*. represents interest added as aforesaid to the half-yearly rests and 1341*l*. 18*s*. 1*d*. represents the interest due on the current half-year in which the whole sum was paid. They accordingly made a claim against the Commissioners of Inland Revenue for that whole sum. The claim was founded on sub-s. 1 of s. 36 of the Income Tax Act, 1918, which is as follows: "Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest."

Their claim was disallowed, but, on appeal to the Special Commissioners they allowed it. A stated case was asked, and, upon the stated case, Rowlatt J. affirmed the judgment of the Special Commissioners. Appeal being taken to the Court of Appeal, they reversed the judgment of Rowlatt J. and of the Special Commissioners.

The Court of Appeal approached the case first of all from the point of view of whether the great bulk of the sums paid was interest at all, or whether the half-yearly interests, as they became due and were, according to the practice of the bank, added to the capital so that interest might run on the whole sum, lost their quality of interest by having become capital.

There is no question but that in the case of *Reddie* v. *Williamson*, in Scotland (1), it was so laid down by the Lord Justice-Clerk Inglis, as he then was, better known to English lawyers as Lord President Inglis; but it was argued by counsel for the plaintiffs that that was not the law in England. The Court of Appeal held that it was consonant to English law. This view, although it determined the case as to the greater part of the sum paid, did not determine the question of the 1341*l*. odd, the current interest for the last half-year. This point also the Court of Appeal decided against the plaintiffs upon the ground that s. 36 did not apply to the case in point of a guarantor paying money under his guarantee. The Court of Appeal did not accentuate the fact that, if their view on this point was right, it disposed of the whole case without the question of the first point at all.

I am of opinion that on this point, first really for consideration although taken second by the Court of Appeal, their judgment is right. I agree with the view of the Master of the Rolls. I think that interest payable on an advance from a bank means interest on an advance made to the person

(1) (1863) 1 M. 228.

Viscount Dunedin.

paying. The guarantor does not pay on an advance made to him, but pays under his guarantee. It is true that he pays a sum which pays all interest due by the person to whom the advance is made, but his debt is his debt under the guarantee, not a debt in respect of the advance made to him. That disposes of the whole case, and I think it was therefore unnecessary to decide the other and wider question, and I say so, because I think it would be very advisable, if that question is to be determined, that the bank in question should be a party to the suit. That is my only reason for thinking it better not to decide the question. It must not be inferred at all from this view that I express any doubts as to the soundness of the judgment of the Court of Appeal on this point. I move that the appeal be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading the opinion expressed by my noble and learned friend on the Woolsack and the other opinions about to be expressed, and I concur therein.

LORD ATKIN (read by Lord Tomlin). My Lords, there are two questions of importance in this case. The first is whether when a person has had an overdraft with his bank for a number of years, kept in the ordinary way, by which interest at the end of each half-year is added to the total sum then due and interest charged on that total sum, the person who pays the accumulated overdraft at the end of three or four years has paid interest on the overdraft for those years. The second is whether, if he has, a guarantor of the advance with interest who pays the total sum due can be said to be "the person by whom the interest is paid" within the meaning of s. 36, sub-s. 1, of the Income Tax Act, 1918. My Lords, I understand that the majority of your Lordships are of opinion that the guarantor in such a case cannot be said to have paid the interest within the meaning of the section. I confess to feeling doubts on this point, for there can be no doubt, I think, that, as the result of the sum of money paid by the guarantor, the interest due from the principal debtor was in fact paid, and that if the principal debtor were sued he could support a plea of payment. Similarly, it might, I think, be said that if a guarantor of rent pays under the guarantee he pays the rent—not, it is true, his rent, but the rent of the tenant. No one would, I think, doubt that payment by a guarantor made within the stipulated time would defeat a forfeiture for non-payment of rent. But one has to construe the words used in a particular case, and if your Lordships have come to the conclusion that the words of the section do not give the guarantor the relief that is given to the principal debtor, I do not dissent.

The result is that it becomes unnecessary to consider the first point. The question there raised, involving consideration of the statement that by adding interest to the advance at the end of each half-yearly "rest" the interest is in fact paid, is one of great mercantile importance, and one which I venture to think it would, unless necessary, be undesirable to decide in a case where your Lordships could not have the advantage of hearing the views of any bank. I concur with the motion proposed.

LORD THANKERTON. My Lords, the appellants, who were interested in a company called Blumfield, Ld., from time to time gave guarantees to the Midland Bank, Ld., to secure the indebtedness of the company to the bank (inter alia) on the company's current account with the bank, the total liability under each guarantee being limited to a definite sum.

From the year 1920 onwards the company was continuously indebted to the bank in large amounts. In accordance with the ordinary custom of banks, the interest accruing on the overdraft amounts was added to the amount overdrawn by half-yearly rests, interest being thereafter charged on the amount so added. Payments into the account were made by the company from time to time, but, with the exception of the half-year to December 31, 1924, the amounts paid in were insufficient to meet the borrowings each half-year, and the indebtedness steadily increased. As at June 30, 1920, the balance due to the bank was 28,894*l.* 15*s.* 11*d.*, and upon November 17, 1926, when the account was closed, the total amount due to the bank was 64,482*l.* 16*s.* 8*d.*

The bank pressed the appellants for payment under their guarantees from time to time, and eventually the company's whole indebtedness of 64,482*l.* 16*s.* 8*d.* was satisfied by the appellants on November 17, 1926, by means of a loan made by the bank to the appellants personally. The company is completely insolvent, and there is no chance of the appellants obtaining any reimbursement from the company.

The appellants, in terms of s. 19 of the Finance Act, 1926, claimed repayment of income tax under s. 36 of the Income Tax Act, 1918, on the interest amounting to 17,861*l.* 16*s.* 5*d.* debited half-yearly to the company's account with the bank from January 1, 1920, to November 17, 1926, when the account was closed.

The provisions of s. 36 of the Act of 1918, so far as relevant, are as follows:—

"36. (1.) Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest.

Provided that no repayment shall be made unless the Commissioners of Inland Revenue are satisfied that the interest has been or will be brought into account in the statement delivered or to be delivered for the purposes of income tax by the person making the advance."

It is not disputed that the sum in question was paid by the appellants out of profits or gains brought into charge or that the proviso to the section has been satisfied. Further, it is not now disputed by the appellants that, under the rule in *Clayton's* case (1), the appropriation of the amounts paid in by the company during the currency of the account to satisfaction of the debits in their chronological order includes

(1) (1816) 1 Mer. 572.

the discharge by the company of the interest for the first three half-years, which amounts to 3675*l*. 15*s*. 6*d*., and that their claim falls to be reduced by that amount.

Two questions were in issue in this appeal—namely, (*a*) whether the claim came within s. 36, and (*b*) if so, whether the claim, so far as it related to the amounts of interest entered as a debit at each of the half-yearly rests up to and including the rest at June 30, 1926, constituted interest within the meaning of the section.

The respondents maintained that the appellants' claim did not fall within the section on two alternative grounds—namely, first, in respect that the appellants, as guarantors to the bank, did not pay interest on advances by the bank, but a sum due under the guarantee, the quality of the payment being determined by the guarantee and not by the quality of the obligations of the principal debtor, although the latter were invoked for the purpose of ascertaining the amount of the guarantors' liability; and, secondly, that the section only related to payment of interest by the person to whom the advances were made. The appellants disputed both these contentions on general grounds, and also on the terms of the particular guarantees granted by them.

My Lords, I am of opinion that both contentions of the respondents are right, and that on a ground that is really common to both. Interest is the return given for the use of the advances, and is due by the person who obtains the advances; the liability of the guarantor is direct to the creditor, and is an undertaking to indemnify him against loss. The creditor computes his loss by the amount of the failure of the principal debtor to pay him principal and interest. In paying the amount of the indemnity, whether limited or otherwise, I am of opinion that the guarantor cannot be said to be paying interest to the creditor, though he is making good the loss of interest. The terms of the specimen guarantee included in the stated case is a guarantee for "all and every the sum or sums of money which shall at any time be owing to the bank," with a long list of how

Lord Thankerton.

the debt may arise, including unpaid interest as a possible source of the indebtedness, and is in conformity with the view above expressed. I am therefore of opinion that s. 36, sub-s. 1, only relates to the person who has obtained the advances, and that a guarantor does not pay interest to the bank within the meaning of the section.

In that view, it becomes unnecessary to consider question (*b*), which raises a question of importance as to what is the effect of the practice of adding the amount of interest accrued at half-yearly or yearly rests as a debit item in the account, and whether such debit item retains the quality of interest. On that question I desire to reserve my opinion.

I am therefore of opinion that the appeal should be dismissed.

LORD MACMILLAN. My Lords, the appellants assisted the finances of a company known as Blumfield, Ld., by granting their personal guarantees to secure the company's indebtedness to the Midland Bank. The guarantees were all in similar terms, and the specimen exhibited shows that the appellants undertook to pay to the bank all sums which should at any time be owing by the company to the bank together with all interest, discount and other banker's charges, the liability under each guarantee being limited to a definite sum. Having been called upon by the bank under these guarantees to discharge the company's indebtedness, the appellants, on November 17, 1926, paid to the bank a sum of 64,482*l.* 16*s.* 8*d.*, being the sum then due by the company to the bank. It appears from a summarized statement of the company's account with the bank from December 31, 1919, to November 17, 1926, that during this period the bank calculated the interest on the company's indebtedness at half-yearly intervals, and at the end of each half-year accumulated the interest with the principal. Of the total sum of 64,482*l.* 16*s.* 8*d.* paid by the appellants to the bank, the sum of 17,861*l.* 16*s.* 5*d.* consisted of these half-yearly interest debits together with the interest accrued for the broken period from June 30 to November 17, 1926.

The appellants contended that in paying to the bank the sum of 64,482*l.* 16*s.* 8*d.* they paid 46,621*l.* 0*s.* 3*d.* as principal and 17,861*l.* 16*s.* 5*d.* as interest. They so contended in order to secure the benefit of s. 36, sub-s. 1, of the Income Tax Act, 1918, which provides that where interest payable on an advance from a bank is paid to the bank, without deduction of tax, out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled to repayment of tax on the amount of the interest so paid. This provision was first introduced into the income tax system by s. 22 of the Finance Act, 1915. In the ordinary case a borrower from a bank who is not carrying on a trade or business is not entitled in computing his income for tax purposes to deduct the interest paid by him to the bank, nor is he entitled in paying the interest to the bank to deduct the tax thereon, for such interest is not treated as annual or yearly interest. A person engaged in trade or business, on the other hand, who has obtained an advance from the bank for the purposes of his trade or business, is permitted in computing the balance of his profits or gains to deduct the interest which he has to pay to the bank. The effect of s. 36, sub-s. 1, of the Income Tax Act is to give every one, whether engaged in trade or business or not, who pays interest on an advance obtained from the bank, the right to repayment of tax on the amount of such interest if he has paid it without deduction of tax and out of profits or gains brought into charge. Persons engaged in trade or business, however, will not ordinarily benefit by this provision for, as they deduct such interest in making the return of their profits, they do not pay it out of profits or gains brought into charge. On the other hand, borrowers from a bank who are not engaged in trade or business or who have obtained an advance for purposes not connected with their trade or business, obtain by virtue of the section the benefit of recoupment of tax on the interest paid by them to the bank. The rights of the Revenue are safeguarded by the proviso to the section under which no repayment is to be made unless the Commissioners of Inland Revenue are satisfied that the interest has been or will be brought into account in the return made by the bank for income tax purposes.

The appellants claim that they are entitled to this benefit in respect of the sum of 17,861*l.* 16*s.* 5*d.*, forming part of the total sum of 64,482*l.* 16*s.* 8*d.* paid by them to the bank under their guarantees, on the ground that they paid this sum of 17,861*l.* 16*s.* 5*d.* as "interest payable on an advance from a bank." The short answer, in my opinion, is that the appellants received no advance from the bank and owed no interest to the bank. Their relationship to the bank was not that of borrower and lender, and their liability to the bank was solely that of guarantors of a third party's indebtedness to the bank. When they paid the sum of 64,482*l.* 16*s.* 8*d.* to the bank they did so in discharge of their liability to pay whatever sum, whether of principal or interest, Blumfield, Ld., owed to the bank. It cannot, therefore, with legal accuracy be said that the appellants made payment to the bank of interest on an advance from the bank within the meaning of the section. The benefit of the section, in my opinion, is confined to persons who pay interest to a bank on advances which they themselves have received from the bank.

As this ground of judgment is sufficient for the disposal of the appeal, I do not find it necessary to express any opinion as to the question decided adversely to the appellants in the Court of Appeal, and upon which a very full argument was developed at your Lordships' Bar—namely, whether the sums of interest accumulated half-yearly in the account between the bank and the company still retained on November 17, 1926, their original character as interest or had become capitalized by being merged with the principal.

I agree with your Lordships that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 15, 1932.

Solicitors for the appellants: *Peacock & Goddard.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

WESLEY . . . . APPELLANT ; H. L. (E.)*

AND 1932

MANSON . . . . RESPONDENT. April 19.

Revenue—Income Tax—Permanent Discontinuance of Business—Additional Assessment for Year preceding Discontinuance—Mode of Computation—Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29 ; *s.* 31, *sub-s.* 1 (*b*) ; *s.* 34, *sub-s.* 1 (*a*) ; *s.* 35.

The Finance Act, 1926, which by s. 29, sub-s. 1, made the profits or gains of a business assessable on the profits or gains of the year preceding the year of assessment instead of on the average profits or gains of the three preceding years, provides :—

Sect. 31, sub-s. 1 : "Where in any year of assessment a trade, profession or vocation is permanently discontinued, then . . . . (*b*) if the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year . . . . an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April. . . . ."

Sect. 34, sub-s. 1 : "Where in the case of any trade, profession or vocation . . . . it has been customary to make up accounts,—(*a*) if only one account was made up to a date within the year preceding the year of assessment, and that acount was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment."

Held, (1.) that the computation of "the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs" for the purposes of an additional assessment under s. 31, sub-s. 1 (*b*), could not be made by resort to s. 34, sub-s. 1, as the profits or gains to be ascertained were not the profits or gains in the year preceding the year of assessment, but the profits or gains in the year to which the additional assessment related ; (2) that in a case where the annual accounts of the business were made up to a date other than April 5 the profits could be ascertained by an apportionment under s. 35 of the Act.

Decision of the Court of Appeal [1931] 2 K. B. 375 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. whereby an appeal by the Crown upon a case stated by the Commissioners for the Special Purposes of the Income Tax Act was dismissed and the decision of the Commissioners was affirmed.

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON and LORD MACMILLAN.

(1) [1931] 2 K. B. 375.

Harold Wesley (hereinafter called "the appellant") appealed against an additional assessment to income tax in the sum of 7774*l.* for the year ending April 5, 1928. The appellant had for some years carried on the business of a manufacturing stationer. On July 2, 1928, he sold this business to a private limited company. It had been customary to make up the accounts of the business to June 30 in each year. The account for the year ending June 30, 1926, showed a profit of 6898*l.*, and the account for the year ending June 30, 1927, a profit of 11,025*l.* Notwithstanding the change of ownership of the business, one account was made up for the whole year ending June 30, 1928, and this account showed a profit of 15,889*l.*

The appellant had originally been assessed to income tax for the year ending April 5, 1928, in the sum of 6898*l.*, being the amount of the profit shown by the account for the year ending June 30, 1926, in accordance with the provisions of s. 29, sub-s. 1, and s. 34, sub-s. 1 (*a*), of the Finance Act, 1926. For the year ending April 5, 1929, the appellant was primarily assessable under the same provision in the sum of 11,025*l.*, being the amount of the profits shown by the account for the year ending June 30, 1927, but as the company succeeded to the trade after April 5, 1928, sub-r. 2 of r. 11 of the Rules applicable to Cases I. and II. of Schedule D, as substituted by s. 32, sub-s. 1, of the Finance Act, 1926, came into operation, and the appellant was assessed for the year ending April 5, 1929, under the provisions of s. 31, sub-s. 1 (*a*), and s. 35 of the Finance Act, 1926. No question arose in regard to this last named assessment. Under sub-r. 2 of r. 11 of the Rules applicable to Cases I. and II. of Schedule D, as substituted by s. 32, sub-s. 1, of the Finance Act, 1926, it was provided that, in the case of a succession occurring after April 5, 1928, the tax payable for all years of assessment by the person who had previously carried on the trade should be computed as if the trade had been discontinued at the

H. L. (E.)
1932
WESLEY
v.
MANSON.

date of succession. The appellant's liability to income tax for the year ending April 5, 1928, being the year preceding the year of assessment in which the succession occurred, was reviewed under the provisions of s. 31, sub-s. 1 (*b*), and the additional assessment under appeal was made. The amount of the assessment was arrived at by aggregating one-fourth part of the profits shown by the account for the year ending June 30, 1927, with three-fourths parts of the profits shown by the account for the year ending June 30, 1928, and deducting from the aggregate sum the amount of the original assessment for the year ending April 5, 1928.

The result was as follows :—

One-fourth of £11,025	£2,756
Three-fourths of £15,889	£11,916
	£14,672
Less . . .	£6,898
	£7,774

It was contended on behalf of the appellant :—

(*a*) That as it had been customary for the appellant to make up accounts annually to June 30 in each year, and as only one account was made up to a date within the year preceding the year of assessment in which the succession occurred, and that account was for a period of one year ending June 30, 1927, the profits or gains of the year ending June 30, 1927, were required by s. 34, sub-s. 1 (*a*), of the Finance Act, 1926, to be taken to be the profits or gains of the year ending April 5, 1928, which was the year preceding the year of assessment in which the succession occurred.

(*b*) That as the profits or gains which were to be taken to be the profits or gains of the year ending April 5, 1928, were thus determined by s. 34, sub-s. 1 (*a*), of the Finance Act, 1926, it was not necessary in order to arrive at the profits or gains of the year ending on that date to have recourse to the method authorized by s. 35 of the Act, and that section was inapplicable.

(*c*) That the additional assessment under appeal ought to be reduced to the sum of 4127*l.*, being the difference between the original assessment of 6898*l.* made for the year ending April 5, 1928, and the profits or gains of 11,025*l.* shown by the account for the year ending June 30, 1927, which were required to be taken to be the profits or gains of the year ending April 5, 1928, for the purposes of s. 31, sub-s. 1 (*b*), no less than for the purposes of s. 29, sub-s. 1.

It was contended on behalf of the Crown that in order to arrive at the profits or gains of the year ending on April 5 in the year preceding the year of assessment in which the succession occurred, it was necessary to adopt the method authorized by s. 35 of the Finance Act, 1926, and that the amount of the additional assessment had been computed on correct principles.

The Special Commissioners decided in favour of the appellant and reduced the assessment to 4127*l.*, and Rowlatt J. affirmed their determination. The Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.) reversed the decision of Rowlatt J. and restored the assessment of 7774*l.* The arguments are fully reported in the report of the case in the Court of Appeal and need not be repeated.

1932. Feb. 26; March 3. *Latter K.C.* and *Frederick Grant* for the appellant.

Sir Thomas Inskip A.-G. and *Reginald Hills* for the respondent.

The House took time for consideration.

1932. April 19. LORD WARRINGTON OF CLYFFE. My Lords, the question in this appeal turns on the true construction and effect of certain provisions of the Finance Act, 1926, relating to the mode of assessment to income tax under Schedule D in cases where the trade in question is permanently discontinued in any year of assessment, and in particular of s. 31, sub-s. 1 (*b*), of that Act.

The appellant's trade was permanently discontinued on July 2, 1928; that is to say, in the year of assessment commencing on April 6, 1928, and ending on April 5, 1929.

Under s. 31, sub-s. 1 (*a*), of the statute in question the appellant became chargeable and was charged for the year of assessment, 1928–29, on the amount of the profits of the period beginning on April 6, 1928, and ending on the date of the discontinuance, roughly speaking one quarter of the year, and no question arises as to the correctness of this charge.

The question really arises on the true construction and effect of s. 31, sub-s. 1 (*b*). This section, omitting immaterial words, is as follows: "If the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year . . . . an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April."

The year preceding the year of assessment in which the discontinuance occurs was in the present case the year from April 6, 1927, to April 5, 1928. For that year the appellant had been charged under s. 29 of the Act on the full amount of the profits or gains of the year preceding the year of assessment—namely, of the year from April 6, 1926, to April 5, 1927, and under s. 34, sub-s. 1 (*a*), the profits of the year ending June 30, 1926 (up to which date the customary annual account was made up), were taken to be the profits of the year preceding the year of assessment—namely, of the year 1926–1927. The profits of the year ending April 5, 1928, in fact exceeded the amount on which the appellant had been charged for that year, and accordingly s. 31, sub-s. 1 (*b*), came into operation and the additional assessment had to be made.

On the true construction and effect of s. 31, sub-s. 1 (*b*), with all respect to those who have expressed a different view, it seems to me to be reasonably clear that in order to effect the express purpose of the provision namely, that as the result of the additional assessment the appellant is to be charged on the amount of the profits for the year ending April 5, 1928, some means of making the additional assessment other than those prescribed in cases where the year is itself the "year of assessment" (namely, the provisions already referred to of s. 29, sub-s. 1, and s. 34) must be resorted to. Fortunately these other means are supplied by s. 35 which (omitting immaterial words) is as follows: "(1.) Where in the case of any profits or gains chargeable under Case I. . . . . of Schedule D it is necessary in order to arrive at the profits . . . . of any year of assessment or other period, to divide and apportion to specific periods the profits . . . . for any period for which the accounts have been made up . . . . it shall be lawful to make such a division and apportionment. . . . .

(2.) Any apportionment under this Section shall be made in proportion to the number of months or fractions of months in the respective periods."

The additional assessment complained of has been made by the Crown under the provisions of s. 35. I agree with the Court of Appeal that it has been rightly so made, and in my judgment the appeal fails and should be dismissed.

Lord Thankerton. My Lords, on July 2, 1928, the appellant, who carried on the business of a manufacturing stationer, sold his business to a private limited company, and it is not disputed that the provisions of s. 31, sub-s. 1, of the Finance Act, 1926, became applicable for the purpose of determining his liability to income tax. These provisions are as follows:—

"31. (1.) Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this Part of this Act—

(*a*) The person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on the sixth day of April in that year and ending on the date of the discontinuance, subject to any deduction or set-off to which he may be entitled under the section of this Part of this Act which provides for relief in respect of certain losses or under Rule 13 of the Rules applicable to Cases I. and II. of Schedule D, and, if he has been charged otherwise than in accordance with this provision, any tax overpaid shall be repaid, or an additional assessment may be made upon him, as the case may require;

(*b*) If the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year, or would have been charged if no such deduction or set-off as aforesaid had been allowed, an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April, subject to any such deduction or set-off as aforesaid to which he may be entitled."

It had been customary to make up the accounts of the appellant's business for a period of twelve months up to June 30 in each year. For the material years these accounts had shown a profit as follows:—

Account to June 30, 1926 . . .	£6,898
Account to June 30, 1927 . . .	£11,025
Account to June 30, 1928 . . .	£15,889

For the income tax year 1927–1928 the appellant had been assessed to income tax on the profits and gains of that year computed—as directed by s. 29, sub-s. 1, of the Finance Act, 1926—" on the full amount of the profits or gains or income of the year preceding the year of assessment " as defined by s. 34, sub-s. 1 (*a*), of that Act, which is as follows:—

" 34. (1.) Where, in the case of any trade, profession or vocation, or of the occupation of any land occupied solely or mainly for the purposes of husbandry, or of the occupation of any woodlands, it has been customary to make up accounts,—

(*a*) If only one account was made up to a date within the year preceding the year of assessment, and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment."

Accordingly the profit of 6898*l.* shown by the account to June 30, 1926, provided the figure on which the profits or gains for the income tax year 1927–1928 were computed. Similarly, if the trade had not been discontinued during the income tax year 1928–1929, the figure of profit—namely, 11,025*l.*—shown by the account to June 30, 1927, would have provided the figure on which the profits or gains for the income tax year 1928–1929 would have been computed.

On the discontinuance of the appellant's business at July 2, 1928, two assessments were made upon him under the provisions of s. 31, sub-s. 1, of the Finance Act, 1926—namely, (1.) an assessment in respect of the broken period of the income tax year, 1928–1929 (April 6 to July 2, 1928) under s. 31, sub-s. 1 (*a*), the amount being ascertained by an apportionment under s. 35 of the Act, and (2.) an additional assessment in the sum of 8102*l.* (corrected to 7774*l.*) for the year ending April 5, 1928, under s. 31, sub-s. 1 (*b*), the amount being ascertained by an apportionment under s. 35, and deduction therefrom of the original assessment of 6898*l.*

No exception was taken by the appellant to the first of these assessments, but he challenges the amount of the second assessment as not being arrived at in terms of the provisions of s. 21, sub-s. 1 (*b*), and it will be convenient to examine exactly how this assessment was arrived at. Sect. 35, which was used for the purpose, provides as follows :—

" 35. (1.) Where in the case of any profits or gains chargeable under Case I., Case II., Rule 4 of Case III. or Case VI. of Schedule D it is necessary, in order to arrive at the profits or gains or losses of any year of assessment or other period, to divide and apportion to specific periods the profits or gains or losses for any period for which the accounts have been made up, or to aggregate any such profits or gains or losses or any apportioned parts thereof, it shall be lawful to make such a division and apportionment or aggregation :

Provided that nothing in this section shall be construed as limiting the power of the general commissioners with respect to the adjustment of an assessment under Rule 9 of the Rules applicable to Cases I. and II. of Schedule D.

(2.) Any apportionment under this section shall be made in proportion to the number of months or fractions of months in the respective periods."

Proceeding on the view that the "year of assessment" of the additional assessment under s. 31, sub-s. 1 (*b*), was the income tax year 1927-1928, and applying s. 35, the additional assessment was arrived at as follows :—

One-fourth of the profit of £11,025 shown by the account to June 30, 1927 .	£2,756
Three-fourths of the profit of £15,889 shown by the account to June 30, 1928	£11,916
	£14,672
Less the original assessment . .	£6,898
	£7,774

The appellant disputes this construction of s. 31, sub-s. 1 (*b*), and maintains that the "year of assessment" of the additional assessment is the "year of assessment in which the discontinuance occurs," which is admittedly the income tax year 1928–1929, that the "profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs" are therefore the profits or gains of the year preceding the year of assessment and fall to be computed under s. 34, sub-s. 1 (*a*), and that, accordingly, it is not necessary to resort to s. 35 for an apportionment. In this view the additional assessment would be an assessment for the year ending April 5, 1929—not the year ending April 5, 1928—and would be arrived at as follows :—

Profit shown by the account to June 30, 1927	£11,025
Less the original assessment . . .	£6,898
	£4,127

The appellant seeks to have the assessment corrected to that figure.

My Lords, certain general observations may be made at this stage. Under s. 237 of the Income Tax Act, 1918, "Year of assessment" means, with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax, and this provision, taken along with ss. 1 and 2 of the 1918 Act, makes clear that the year of charge and year of assessment must be the same. Secondly, the Income Tax Act, 1918, as amended by later Finance Acts, operates as regards any particular income tax year by virtue of the Finance Act of that year, in terms of s. 1 of the 1918 Act.

It follows, in my opinion, that the solution of the present question will depend on whether the additional assessment provided for under s. 31, sub-s. 1 (*b*), of the Finance Act, 1926, which amends the Income Tax Act, 1918, was charged in the present case by the Finance Act, 1927, or by the Finance Act, 1928. The amendments of the 1918 Act made by Part IV. of the Finance Act, 1926, were operative under both the Finance Act, 1927, and the Finance Act, 1928, as regards their respective income tax years.

In my opinion, the whole question turns on the construction of the words in s. 31, sub-s. 1 (*b*): "an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April." It is agreed that in this case "the said year" is the year ending April 5, 1928. Now, these are words of charge and not words of computation,

H. L. (E.)
1932
WESLEY
v.
MANSON.
Lord Thankerton.

and it is difficult to see how the Finance Act of 1928 could be held to charge the profits of the year to April 5, 1928, although it could charge the profits of the year ending April 5, 1929, by computing them on the profits of the year ending April 5, 1928. On the other hand, I see no difficulty in holding that the additional assessment is part of the charge made by the Finance Act, 1927, on the profits of the income tax year ending April 5, 1928, and that it is authorized by the operation of Part IV. of the Finance Act, 1926, under the Finance Act, 1927, which enacted that income tax should be charged for the year ending April 5, 1928 (Income Tax Act, 1918, s. 1).

In that view, the phrase "the year preceding the year of assessment in which the discontinuance occurs" is merely for the purpose of identifying the profits or gains which are to be subject to the additional assessment, and also to the charge involved in such assessment, and, as I have already stated, I am of opinion that the profits and gains of that previous year could only be held to be charged and assessable under the Finance Act of that previous year. Further, the words "so that he shall be *charged for that preceding year* on the amount of the profits or gains of the said year" in s. 31, sub-s. 1 (*b*), are to be contrasted with the words "shall be *charged for that year*" (i.e., the year of assessment in which the trade is discontinued) "on the amount of the profits or gains of the period beginning on the sixth day of April in that year and ending on the date of the discontinuance" in s. 31, sub-s. 1 (*a*).

If, then, the year of assessment of the additional assessment is the year ending April 5, 1928, there is no room for the application of s. 34, sub-s. 1 (*a*), and it is necessary to have recourse to s. 35, with the result that the appeal fails. It seems to me that the Special Commissioners and Rowlatt J. did not give sufficient weight to the view that it is the profits and gains of 1927–1928 that are being brought into charge and assessment. I agree with the learned judges of the Court of Appeal and in particular with the judgment of Romer L.J.

I am of opinion, therefore, that the appeal ought to be dismissed with costs.

LORD MACMILLAN. My Lords, Mr. Wesley, the appellant, on July 2, 1928, permanently discontinued the trade of a manufacturing stationer which he had previously carried on, and transferred his business to a private limited company. The question before your Lordships relates to the effect of that discontinuance on the appellant's liability to income tax in respect of the profits or gains of his former business. The appellant was in the practice of making up his accounts annually as at June 30 in each year and the circumstance that his financial year thus did not coincide with the tax year, which ends annually on April 5, is one of the causes which have given rise to the present problem.

As regards the assessment for the year to April 5, 1929, there is no dispute. The parties are agreed that under s. 31, sub-s. 1 (*a*), of the Finance Act, 1926, the appellant is for that year chargeable with tax on the amount of the profits of the business from April 6, 1928, to July 2, 1928, the date of discontinuance. As the business was not wound up but continued by the company which took it over, and as the latter, following the appellant's practice, prepared a single account for the whole year to June 30, 1928, covering the period before as well as the period after its succession, the appellant's profits from April 6 to July 2, 1928, were ascertained by utilizing the method of apportionment provided by s. 35 of the Act of 1926.

It is with regard to the appellant's assessment for the tax year 1927–28 that a question has arisen. For that year the appellant was duly assessed to tax on 6898*l*., the amount of his profits or gains as brought out in his accounts for the year to June 30, 1926, that being the terminal date of his last financial year preceding the tax year 1927–28: see s. 29, sub-s. 1, and s. 34, sub-s. 1 (*a*), of the Finance Act, 1926. But in consequence of the discontinuance of his trade on July 2, 1928, the Inland Revenue became entitled under s. 31, sub-s. 1 (*b*), of the Act of 1926 to reconsider his assessment for 1927–28 in order to ascertain whether his profits or gains for that year, i.e., for the year ending April 5, 1928, exceeded the amount on which he had already been charged for that year, and if any excess was found to exist to make an additional assessment upon him. The comparison which the Act directs is between (1.) the appellant's profits or gains for the year ending on April 5, 1928, and (2.) the amount on which the appellant was charged for that year, the declared object being that the appellant should be charged for the year ending April 5, 1928, on the amount of the profits or gains of that year. The comparison intended to be instituted, as I conceive it, is between the statutory income notionally attributed to the appellant for the tax year 1927–28 and his actual income in that year.

Now as to one of the factors in the comparison—namely, the amount on which the appellant was actually charged for the tax year 1927–28—there is, of course, no question. It is an historical fact that he was charged on 6898*l.*, arrived at as I have already explained. The controversy relates to the other factor—namely, the profits or gains of the appellant's trade for the year ending April 5, 1928. The appellant invokes s. 31, sub-s. 1 (*a*), of the Act of 1926, and says that on a sound construction of s. 31, sub-s. 1 (*b*), his profits or gains for the year ending April 5, 1928, ought to be ascertained from his accounts for the year ending June 30, 1927, on which basis the figure would be 11,025*l.* The Crown replies that what the Act requires is that the actual profits for the year ending April 5, 1928, be taken, and that these are to be ascertained by taking under s. 35 the appropriate proportions of the profits or gains brought out in the accounts of the business for the years to June 30, 1927, and June 30, 1928, i.e., one-fourth of the former and three-fourths of the latter. The profits for the year to June 30, 1927, as already stated, were 11,025*l.*, one-fourth whereof is 2756*l.*; the profits for the year to June 30, 1928, were 15,889*l.*, three-fourths whereof are 11,916*l.* Adding these two sums of 2756*l.* and 11,916*l.* a total of 14,672*l.* is brought out. Stated arithmetically accordingly, the issue is whether the comparison should be between 11,025*l.* and 6898*l.* or between 10,672*l.* and 6898*l.* If the former is right the appellant is liable to an additional assessment on 11,025*l.* — 6898*l.* = 4127*l.*; if the latter is right the appellant is liable to an additional assessment on 14,672*l.* — 6898*l.* = 7774*l.* The Special Commissioners and Rowlatt J. took the former view, the Court of Appeal the latter.

My Lords, in my opinion the Court of Appeal were right. The critical words are those requiring the ascertainment of "the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs." The year of assessment in which the discontinuance occurred in the present case was the tax year 1928–29. The year preceding that year was the year 1927–28. If this is right—and I confess I have difficulty in seeing how it can be otherwise than right—the appellant in my view cannot avail himself of s. 34, sub-s. 1 (*a*), in order to make his accounts for the year to June 30, 1927, the basis of ascertaining his profits or gains for the year ending April 5, 1928. The date June 30, 1927, is a date within the tax year 1927–28 and not a date within the year preceding the tax year 1927–28. Moreover, the appellant has already availed himself of s. 34, sub-s. 1 (*a*), for the purpose of ascertaining his profits or gains for 1927–28, inasmuch as his original assessment for that year was, in virtue of s. 34, sub-s. 1 (*a*), based on his accounts for the year ending June 30, 1926. I do not think it can be used over again to ascertain the profits or gains of the year 1927–28 on a different basis.

It comes to this, that the appellant in order to succeed must establish that the additional assessment provided for under s. 31, sub-s. 1 (*b*), is an additional assessment for the year 1928–29, that that year is accordingly the year of assessment within the meaning of s. 34, sub-s. 1 (*a*), and that his profits or gains for the year 1927–28 for the purpose of s. 31, sub-s. 1 (*b*), must therefore, under s. 34, sub-s. 1 (*a*), be based on his accounts for the year ending June 30, 1927, being his accounts made up to a date within the year preceding the year of assessment. I am of opinion that there is no warrant for such a construction.

Finding myself, as I do, in agreement with the decision of the Court of Appeal, and particularly with the judgment of Romer L.J., I concur in the motion that the appeal be dismissed.

LORD TOMLIN. My Lords, I am asked to state that Lord Atkin concurs in the opinion which has been read by my noble and learned friend, Lord Warrington.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 19, 1932.

Solicitors for the appellant: *Gery & Brooks.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
May 9, 10.

KEREN KAYEMETH LE JISROEL, LIMITED . . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Income Tax—Association for settling Jews in Palestine and Elsewhere—Charity—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37.

An association incorporated as a company limited by guarantee had as its main object, as stated in its memorandum of association, "to purchase, take on lease or to exchange or otherwise acquire any land, forest, rights of possession and other rights, easements and other immovable property in . . . . Palestine, Syria, or other parts of Turkey in Asia and the peninsula of Sinai for the purpose of settling Jews on such lands." Then followed in the memorandum twenty-one specified objects and powers, which included power to cultivate and improve any lands and erect buildings thereon, to let any land of the company to any Jews, to acquire, construct and manage tramways, railways, harbours, docks, hydraulic works, telegraphs, telephones, factories and workshops, and to purchase and sell, work and develop mines and mining rights, and to carry on the business of mining and metallurgy. All the twenty-one objects or powers were stated to be subject to a proviso that they were to be "exercised only in such a way as shall in the opinion of the association be conducive to the attainment of the said primary object." No part of the income of the association was distributable by way of dividend, bonus or otherwise by way of profit to the members of the association, nor, in the event of a winding-up, were the surplus assets distributable among them:—

Held, that the association was not "a body of persons . . . . established for charitable purposes only" within s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, so as to be entitled to exemption from income tax in respect of consolidated stock owned by it and representing donations.

Decision of the Court of Appeal [1931] 2 K. B. 465 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts whereby the decision of the Commissioners was affirmed. The question for determination was whether the income of investments forming part of the general funds of the appellant association was exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, as being income of a body of persons or trust established for charitable purposes only. The Commissioners and both the Courts below decided this question in the negative. The case is fully set out in the report before the Court of Appeal.

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* *Present :* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, LORD MACMILLAN, and LORD WRIGHT.

(1) [1931] 2 K. B. 465.

Norman Bentwich and *H. Infield* (with them *Leonard Stein*) for the appellants. This association is established for charitable purposes within Lord Macnaghten's definition in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), and the particular income in question, which forms part of the general funds of the association, is applied for charitable purposes. (1.) The primary object of the association was the acquisition in perpetuity of land in the Land of Promise as the inalienable property of the Jewish people for the purpose of settling Jews on such land. It is a fundamental principle of the Jewish religion that land should be acquired in Palestine for the repatriation of the Jews. The actual living in Palestine is an essential part of the Jewish religion, and the law of Judaism cannot be adequately carried out except in Palestine. The settlement of the Jews in Palestine may therefore rightly be called a purpose for the advancement of religion. The fact that some of the subsidiary objects are not charitable does not affect the main purpose of the association, and this is expressly provided by the memorandum. (2.) This association is established for the benefit of the community, or of a section of the community, whether the association be for the benefit of Jews all over the world or of the Jews repatriated in the Promised Land, and is a charitable institution on that ground. (3.) The association exists for the relief of the poor. This is connoted by the word "settlement." [They cited *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (2); *In re Good* (3); *Institution of Civil Engineers* v. *Inland Revenue Commissioners* (4); *O'Hanlan* v. *Logue* (5);

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(1) [1891] A. C. 531, 583.
(2) (1927) 13 Tax Cas. 58, 66.
(3) [1905] 2 Ch. 60.
(4) [1932] 1 K. B. 149.
(5) [1906] 1 I. R. 247, 275.

H. L. (E.)
1932
KEREN KAYEMETH LE JISROEL, LD. *v.* INLAND REVENUE COMMISSIONERS.

Verge v. *Somerville* (1); *Mitford* v. *Reynolds* (2); *In re Smith. Public Trustee* v. *Smith* (3); *Webber* v. *Oldfield* (4); *Bowman* v. *Secular Society.* (5)]

Sir Thomas Inskip A.-G., J. H. Stamp and *Reginald Hills* for the respondents were not called on.

LORD TOMLIN. My Lords, this is an appeal from an order of the Court of Appeal affirming an order of Rowlatt J., he on his part having affirmed the decision of the Commissoners for the Special Purposes of the Income Tax upon a case stated by the Commissioners for the opinion of the Court.

The question arises under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, under which exemption is granted "from tax under Schedule C in respect of any interest, annuities, dividends or shares of annuities, and from tax under Schedule D in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only." The appellants in this case seek exemption under that section.

The appellants are an association limited by guarantee and not having a capital divided into shares. The association was incorporated in April, 1907, and is no doubt an association connected with what is known as the Zionist movement.

The memorandum and articles of association provide for a number of matters, to some of which it is necessary to refer.

Clause 3 of the memorandum provides for the objects of the association. Sub-clause (1.) is as follows: "To purchase, take on lease or in exchange, or otherwise acquire any lands, forests, rights of possession and other rights, easements and other immovable property in the prescribed region (which expression shall in this memorandum mean Palestine, Syria, any other parts of Turkey in Asia and the peninsula of Sinai)

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(1) [1924] A. C. 496.
(2) (1842) 1 Ph. 185.
(3) [1932] 1 Ch. 153, 173, 176.
(4) [1898] 1 I. R. 431, 446.
(5) [1917] A. C. 406, 443.

H. L. (E.)
1932
Keren Kayemeth Le Jisroel, Ld. v. Inland Revenue Commissioners.
Lord Tomlin.

or any part thereof, for the purpose of settling Jews on such lands."

Then in the subsequent sub-clauses there follow a number of objects of a very varied kind, conferring the widest possible powers. There is a power to clear, cultivate, irrigate, or otherwise improve the lands of the association; power to let any of the land or other immovable property of the association to any Jews upon any terms; power to construct and maintain roads, ways, tramways, railways, bridges, viaducts, aqueducts, and a number of other works of public utility; power to purchase or otherwise acquire, and to sell, dispose of, work, develop, deal with, and otherwise turn to account mines and mining rights, and to carry on the business of mining in any part of the prescribed region, but with a prohibition against anything enabling the association to divest itself of the paramount ownership of any of the soil of the prescribed region which it may from time to time acquire. Some importance is attached to that limitation. Then there is power to purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on any business which the association is authorized to carry on; power to acquire from any Government or other authority concessions and the like; power to sell, mortgage, exchange, grant licences, easements and other rights, in respect of and over, and in any other manner deal with or dispose of or turn to account the undertaking, and all or any of the property and assets for the time being of the association; and there is a similar qualification against the association's divesting itself of the paramount ownership of the soil. There is also power to borrow or raise money, to make, accept, indorse and execute negotiable instruments and bills of exchange; power to promote any companies for any purpose which may seem likely, directly or indirectly, to benefit the association, and to acquire, hold, and deal with shares or other interests in any such company; power to enter into any arrangement for sharing profits, union of interests, joint adventure, or co-operation with any person or company carrying on or about to carry on any business which the association is authorized to carry on. There are a number of other very wide and general powers.

Then at the end of clause 3 there is this proviso : "Provided also that the primary object of the association shall be and is hereby declared to be the object specified in sub-clause (1.) of this clause, and the powers conferred by the succeeding sub-clauses of this clause shall be exercised only in such a way as shall in the opinion of the association be conducive to the attainment of the said primary object."

Then clause 4 provides : "The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association, as set forth in this memorandum of association, and no part thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit, to the members of the association." In the same way there is a provision that in a winding-up the members are to take nothing.

In clause 7 there is a provision that "unless and until an order shall have been made or an effective resolution shall have been passed for the winding-up of the Jewish Colonial Trust, Limited"—that is another company connected with the Zionist movement—"no person shall be capable of becoming a member of the association who is not a holder, either solely or as one of two or more joint holders, of founders' shares or a founder's share in the said Jewish Colonial Trust." After an order has been made for winding up that trust "no person shall be capable of becoming a member of the association who is not a member of some body which shall for the time being be carrying on an undertaking similar to and in succession to the undertaking of the said Jewish Colonial Trust or of some other body designated by special resolution of the association."

Under the articles there is what is called a controlling committee, the purpose of which is really to act as a delaying committee; that is to say, it can veto the exercise by the directors of any of their powers until either the controlling committee or the association in general meeting resolve to the contrary. That controlling committee consists of persons who from time to time form the small actions committee, constituted by or under the rules or regulations adopted or recognized by the most recent Zionist Congress for the time being. So there is a body nominated by the Zionist Congress which has an element of control over this association.

Now the claim of the association is that certain funds which it holds—some 32,000*l.* invested in Consols of this country, the association itself being an English company—are exempt from income tax under the section which I have read, on the ground that it is an institution established for charitable purposes only within the meaning of the section. Those funds, in fact, I understand, are the result, in the main, of donations which various persons have made to the association, but it is not disputed that they form part of the general funds of the association and are not the subject of any special trust. Therefore the question arises under the first part of sub-s. 1 (*b*) of s. 37.

The Courts below have reached the conclusion that this is not an institution established for charitable purposes only, and the appellants complain of the orders that have been made by the Courts below substantially on three grounds. It is said that the association is an institution established for charitable purposes only: first, because it is really established for a religious purpose; secondly, because, if it is not established for a religious purpose, it is established for the benefit of a community within the meaning of those cases in which it has been held that a trust fund is held on a good charitable trust if it is held upon trusts which are beneficial for the community or some class of the community; thirdly, because, if the case cannot be made good on either of those heads, it still may be made good as being a trust which is for the benefit of poor Jews.

I shall consider the matter under each of those three heads.

With regard to the submission that this is a good charitable trust for religious purposes, the case is put in this way:

It is said, and no doubt truly, that the return of the Jews to the Promised Land is an element of great importance in their religion and their religious life. Attention is called to the texts in which the promises were made to Abraham. It is pointed out that in those texts—and the one in the fifteenth chapter of Genesis is taken as an illustration—the promise in relation to the land extends beyond what is commonly called the Holy Land or Palestine, and that the Promised Land includes more than that.

The eighteenth verse of the fifteenth chapter of Genesis is in these terms: "In the same day the Lord made a covenant with Abram saying, Unto thy seed have I given this land, from the river of Egypt unto the great river, the river Euphrates." The nineteenth and following verses refer to the Kenites and the Kenizzites and the Kadmonites and a number of other tribes. It is said that this promise covers, as no doubt it does, a wider area than Palestine in the ordinary acceptance of that term as a geographical term. On the other hand, it may be said that the precise geographical limits indicated by those verses are somewhat obscure, but this, I think, is certain, and is recognized quite fairly by counsel for the appellants, that the first sub-clause of clause 3 of the memorandum goes beyond any area which on any view of these texts could be comprised in the terms used. The prescribed region in sub-clause (1.) of clause 3 is defined in this way: "which expression shall in this memorandum mean Palestine, Syria, any other parts of Turkey in Asia, and the peninsula of Sinai." Now it must be remembered that the articles of association were framed in the year 1907, and the extent of Turkey in Asia at that time was considerable; it extended much beyond Palestine and Syria, and certainly included, as it does to-day, Asia Minor, and no doubt other regions. Asia Minor, and other regions outside Syria and Palestine, could not on any view be treated as included in the region covered by the description in Genesis. However, bearing that in mind, the point is this, and this is the way it is put—it is said that it is an essential part of the Jewish religion to look forward to the return of the race to the Promised Land, and that this is apparent not only from the texts of Scripture but from Rabbinical writings, from the daily prayers, and from other matters connected with the Jewish religion. Indeed, it is put in two ways. It is said, first, that there are many commandments of the religion which cannot be effectively performed except in the Promised Land, and secondly, that it is only with Judaism established in the Promised Land that the real influence of Judaism can be properly exercised. That being so, it is an essential part of the Jewish religion that daily the devout Jew should pray for the return of the race to the Promised Land, and it is to him of the very essence of his religion that the race should so return. Basing themselves upon that, which I accept absolutely as an accurate statement of the Jewish feeling in the matter, the appellants say that we must construe this memorandum and the articles of association so as to give them the sense of establishing an association for charitable purposes.

My Lords, I think myself that that argument must fail. We are concerned here only with the language which is employed in this memorandum before us. There is not in it a word which can suggest anything of a religious character. It is quite true that the minds of those who are intimately concerned with the working of this association may be affected by religious motives and religious sentiments in taking the part which they do take in the work which this association performs, but, none the less, the object of the association is not to do something which is in itself religious; it is not, in any sense in which the words, as English words, can be construed, creating a trust for the advancement of religion. It is only when you go subjectively to the minds of those concerned that you are able to introduce any element of the kind at all. If the arguments of learned counsel in favour of this view were well founded, it seems to me that such clauses as these might have a different meaning and effect according to the character of those who happened to be the promoters concerned in the working of the association.

But, whether that be well founded or not, there are other reasons why it seems to me the argument must fail. There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object, and I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable. I confess I feel great difficulty, in the face of the elaborate powers of a non-charitable character which are contained in this memorandum, in saying, quite apart from any other reason, that sub-clause (1.), which in itself has no language directly indicative of charitable purposes, is to be construed as charitable.

But there is another reason which seems to me disastrous to the appellants' argument on this head, and that is the prescribed region itself, because the whole argument with regard to the religious element is linked up with the return to what they call the Promised Land, and in fact this region is far wider than the Promised Land on any construction of the promise. Even if they are right in the view which they take about an activity to settle Jews in the Promised Land, it seems to me that as soon as you find that the activity is not only to settle Jews in the Promised Land but to settle Jews in lands which are not and never have been part of the Promised Land, you have a combination of objects, religious and non-religious, which cannot be separated, and this combination is fatal to the contention that this association is established for charitable purposes only. In my view, therefore, the first point, that this is a religious charity, necessarily fails.

H. L. (E.)
1932
KEREN KAYEMETH LE JISROEL, LD. v. INLAND REVENUE COMMISSIONERS.
Lord Tomlin.

Then the next point is that, if it is not religious, it is said to be beneficial to the community. I have great difficulty, as indeed counsel for the appellants had, in identifying the community. They suggest some alternatives. First of all, they suggest that the community is the community of all the Jews throughout the world. That seems to me to be very difficult. They next suggest that it is the Jews in the prescribed region, but I have great difficulty in seeing why they should be the community, because, although the Jews who are to be settled under the objects no doubt include Jews in the prescribed region, there are also included Jews outside the prescribed region, and whether a settling of Jews from outside the prescribed region is for the benefit of Jews within the prescribed region—it may or may not be ; I do not see any indication one way or the other—I think it is extraordinarily difficult to say that within the meaning of the cases there is really any community to be found in the circumstances before your Lordships' House.

My Lords, that leaves the third point—the poverty point. I confess that this point seems to me very difficult to advance consistently with the argument which has been put before your Lordships on the point that the association is an institution for religious purposes. The two things do not seem to me to be really consistent, but on the merits of the point I confess I am unable to see how, by any straining of the language, this can be limited to poor Jews. Clause 3, sub-clause (1.), is "for the purpose of settling Jews on such land." It is suggested that there can be got out of the word "settling" some element which suggests poverty, and reference is made to the case of the repatriation of Australian soldiers : *Verge* v. *Somerville* (1), where it was said that the word "repatriating" connoted something suggestive of poverty ; but I am unable to find in this word any such element at all. Indeed, it is legitimate to refer to some others of the clauses, which may not be decisive on the matter, but which seem to me to point against the contention of the appellants. For example, sub-clause (3.) of clause 3 contains power "to let any of the land or other immovable property of the association to any Jews upon any terms." Although, as I say, it is not decisive upon a point of this kind, it is certainly an element which points against it, and I think there is not sufficient in the language employed to justify the conclusion that any element of poverty is an essential part of the scheme which the memorandum embodies.

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(1) [1924] A. C. 496.

My Lords, for these reasons I think that this appeal must fail, and I move your Lordships that it be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I agree, and have nothing to add.

LORD THANKERTON. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend on the Woolsack. I would also like to express my concurrence in particular with the judgment of Lawrence L.J. in the Court of Appeal, which seems to me to deal very fully and very adequately with the matter before your Lordships.

There is only one point upon which I would like to add a sentence or two, and that is on the question of the claim that this is a trust for purposes beneficial to the community. The first ground on which it was put, as my noble and learned friend has just said, was that it was for the benefit of Jews all over the world. My Lords, I desire to say on that point that I also do not think that they can be described as a community in the sense in which that word is used in this connection. It seems to me that "community" predicates the existence of some political or economic body settled in a particular territorial area, and that the trust must be for that political or economic unit or a particular class within that particular political or economic unit.

The alternative ground on which it was sought to bring this trust within that class was in the view that it was for the benefit of Jews within the prescribed area. In addition to the comment, which would be fatal in itself, that those Jews may include people who are not actually within the prescribed area at all, again it does seems to me more than doubtful whether that is a community in the sense which I have suggested, because the area here is an enormous area with no political or economic homogeneity between the various parts of the area. It is quite indefinite, and I doubt very much whether, on that head, there is a community in which even the Jews who are settled within the prescribed region could be described as a particular class.

LORD MACMILLAN. My Lords, the question in this appeal is really a very short one on ultimate analysis. It is whether the appellant company are a body of persons established for charitable purposes only. The memorandum of association of the company expresses the purpose of the company in the clearest possible way. The association is stated to have been established with the object of entering into certain transactions and carrying on certain activities, all for the purpose of settling Jews on lands in the prescribed region in Asia. The purpose being thus defined for us by the memorandum, the question is whether this purpose of settling Jews in a certain region of Asia is a charitable purpose.

My Lords, it has been suggested that, while the transactions which may be entered into and the operations which may be carried on are ordinary enough operations of land acquisition, settlement and development, nevertheless the motive which is behind all these transactions and operations is predominantly a religious motive. It may well be that those who propose to carry on these activities are in point of fact animated by religious motives, but I am afraid that the income tax code applies a more objective test: it looks at the nature of the transactions; it looks at the character of the activities; and it does not look behind these to what may be the motive which has prompted the formation of the company.

For these reasons, which my noble and learned friend on the Woolsack has already so fully expounded, I am quite unable to see that the purpose of settling Jews in this region

H. L. (E.)
1932
Keren Kayemeth Le Jisroel, Ld. v. Inland Revenue Commissioners.

can be described as a religious purpose, whatever may be the actuating motive, or as a charity having for its purpose the benefit of a certain section of the community, or as a charity for the relief of the poor. These were the three categories into one or other or all of which it was suggested that this charity, if it be a charity, might fall. In my opinion the appellants have failed to bring it within any one of these categories, and consequently have failed in what it was essential for them to make out—namely, that they are a body of persons established for charitable purposes only.

Lord Wright. My Lords, I entirely agree with the opinion which has been delivered by the noble Lord on the Woolsack.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 10, 1932.

Solicitors for the appellants: *Herbert Baron & Co.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

TOOGOOD AND SONS, LIMITED . . . APPELLANTS ;

AND

GREEN . . . . RESPONDENT.

H. L. (E.)*
1932
May 13.

Rating—Derating—Industrial Hereditament—Seed Cleaning Premises—Seeds sold to Retail Customers—Primarily occupied and used for Purposes of a Retail Shop—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1; *s.* 4.

The appellants, a firm of seed merchants, owned and occupied a hereditament consisting of a large warehouse, used for cleaning and testing seeds of their own growth for the purposes of sale, and certain subsidiary buildings, including offices, which were admittedly not used for industrial purposes. The hereditament was registered as a factory. A claim that the hereditament was an industrial hereditament was opposed by the Crown on the ground that the premises were primarily occupied and used for the purposes of a retail shop within the meaning of the Rating and Valuation (Apportionment) Act, 1928. By a special case stated under s. 11 of the Quarter Sessions Act, 1849, it was found that all the seeds were sold to customers other than the trade, that orders for the same were received by the appellants at their offices, and that the seeds were dispatched from the warehouse in fulfilment of such orders. At the hearing in the House of Lords, in answer to a request by the House for further information as to the exact nature of the uses to which the hereditament was put, it was agreed that the seeds were sold in approximately equal quantities to trade customers and to customers other than the trade, that the retail sales were effected either by travellers or by letters addressed to the hereditament or by telephone; that the offices had none of the physical features of a shop, and that the appellants had no accommodation adapted for the purpose of the physical resort of customers:—

Held, that the hereditament was not primarily occupied and used for the purposes of a retail shop within the meaning of the Act and that it was an industrial hereditament.

Finn v. *Kerslake* [1931] A. C. 446, 457; *Turpin* v. *Middlesbrough Assessment Committee* [1931] A. C. 446, 451; and *Kaye* v. *Eyre Brothers, Ld.* [1931] A. C. 446, 451 distinguished.

Decision of the Court of Appeal [1932] 1 K. B. 204 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) a judgment of a Divisional Court (Lord Hewart C.J.,

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

(1) [1932] 1 K. B. 204.

Avory and MacKinnon JJ.) upon a special case stated under s. 11 of the Quarter Sessions Act, 1849, in an appeal to the Court of Quarter Sessions for the County Borough of Southampton, relating to a draft valuation list made under the Rating and Valuation (Apportionment) Act, 1928.

The appeal raised the question whether a hereditament on which was carried out the work of cleaning and sorting and testing seeds, and on which there was an office at which orders for the seeds were received for retail sale, was primarily occupied and used for the purposes of a retail shop, as defined by the Act, or was an industrial hereditament within the meaning of s. 3 of the Act.

The Assessment Committee decided that the hereditament should be excluded from the special list. The Divisional Court ordered that the hereditament should be included in the special list, but this order was set aside by the Court of Appeal.

The facts found by the special case are stated in the report before the Court of Appeal. After the arguments on the present appeal had proceeded some way, their Lordships expressed a desire for further information as to the exact nature of the uses to which the hereditament was put, and the hearing was adjourned for this purpose. At the adjourned hearing the parties had agreed upon an amended statement of facts, which is fully set out in the opinion of Lord Thankerton, and is summarized in the headnote.

1932. Feb. 19, 22, 23; March 10. *Singleton K.C.* and *Pritt K.C.* (with them *Charles L. Henderson*) for the appellants. Assume that an office where orders are received by post is a retail shop, which is not admitted, *Finn* v *Kerslake* (1) does not decide this case. It was a decision on its own particular facts, and in every case the crucial question is what is the dominant feature of the premises. There is here no question but that the factory of itself would be treated as an industrial hereditament: *Hines* v. *Eastern Counties Farmers' Cooperative Association, Ld.* (2) The decision of the Court of

(1) [1931] A. C. 446, 457. (2) [1931] A. C. 446, 456.

H. L. (E.)
1932
TOOGOOD & SONS, LD.
v.
GREEN.

Appeal comes to this, that if the products of a factory are sold retail on the premises it necessarily follows that the primary purpose is the business of the shop, although the bulk of the premises is used for a factory purpose. It is a fallacy to say that when you have production and sale on the premises, production is necessarily ancillary to the sale. On the facts this hereditament is primarily used for a factory purpose.

Secondly, an office where orders are received by post for goods supplied from the warehouse is not a shop within the meaning of the Act. Retail trade is admitted, but there is nothing in the premises of a similar character to a retail shop. Not only has the office none of the popular characteristics of a retail shop, but the public do not resort to it physically. This distinguishes the present case from *Turpin's* case (1) and *Eyre's* case. (2) [They also referred to *Moon* v. *London County Council.* (3)] On the additional facts it is even more clear that this is not a retail shop.

Sir Thomas Inskip A.-G. and *Wilfrid Lewis* (with them *Colin H. Pearson*) for the respondent. This hereditament must be looked at as a whole, and if it is non-industrial it cannot be apportioned. It cannot be dissected: *Inland Revenue Officer* v. *Gunn, Collie & Topping.* (4) There is no real distinction between business done over the counter and business done through the post. This office is a place where customers address their letters and ask that their wants shall be supplied. It is a place whose character is similar to that of a retail shop, because it is a place where retail customers get their wants satisfied. On authority there can be only one answer to the question whether this is a shop within the meaning of the Act. If this case is distinguished from *Finn* v. *Kerslake* (5) the effect will be to water down that decision as a decision of principle. The garage cases show that the popular attributes of a shop are not necessary, but the test is whether the public resort thereto to have their wants satisfied.

(1) [1931] A. C. 446, 451.
(2) [1931] A. C. 446, 451.
(3) [1931] A. C. 151.
(4) 1930 S. C. 389, 401.
(5) [1931] A. C. 446, 457.

[They also referred to *Wilkinson* v. *Sibley* (1) and *Wallace* v. *Dixon.* (2)]

The House took time for consideration.

1932. May 13. LORD THANKERTON. My Lords, the appellants are owners and occupiers of a hereditament situate at Blighmont Park, Millbrook, near Southampton, which is described in the valuation list as a seed warehouse, offices, canteen and outbuildings. The respondent is the Revenue Officer for the Southampton County Borough Assessment Area.

The question in this appeal is whether the hereditament is an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The Assessment Committee determined that it was not, but, on appeal by special case under the Quarter Sessions Act, 1849, a Divisional Court of the King's Bench reversed that decision; on appeal from the latter decision, the Court of Appeal restored the decision of the Assessment Committee.

The premises in question are registered as a factory and workshop under the Factory and Workshops Acts, 1901 to 1920, and therefore fall to be classed as an industrial hereditament, unless they are excluded by the proviso to s. 3, sub-s. 1, of the Act of 1928.

The Crown maintained that the hereditament is so excluded in respect that it is " primarily occupied and used for . . . . the purposes of a retail shop." Under s. 3, sub-s. 4 : " 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

The premises comprise the following buildings :—

Warehouse No. 1.—An extensive modern warehouse, consisting of seven floors with an aggregate floor area of 66,971 square feet.

A smaller warehouse, consisting of two floors with an aggregate floor area of 3588 square feet.

A block of administrative offices, consisting of two floors and a store room in the roof with a total floor area of 8894 square feet.

(1) [1932] 1 K. B. 194.

(2) [1917] 2 I. R. 236.

A wooden hut, with a total floor area of 2400 square feet.

The nature of the use and occupation of the premises is described in the special case as follows: "The block of offices is used for the purpose of offices and the smaller warehouse is used for packeting seeds, and the wooden hut is used as a recreation room for the staff. It is conceded by the appellants (Toogood & Sons, Ld.) that these buildings, comprising a floor area of 14,882 square feet, are occupied and used for purposes other than industrial purposes. As to warehouse No. 1, the work carried on in this building chiefly consists of cleaning, testing, analysing and sorting seeds of two categories namely, (*a*) vegetable and farm seeds and (*b*) flower seeds. The former category represents not less than 90 per cent. of the appellants' turnover in bulk. There is no warehousing as an end in itself in this building, the appellants having other property in Southampton which is used for that purpose." A detailed description of the purposes for which the seven floors of warehouse No. 1 are used shows that the roof floor is used as a testing station and that the fourth, third and second floors are given up to seed-cleaning machinery; as regards the remaining floors, the special case states: "On the first floor a hand machine is installed and used for cleaning small seeds, and apart from that the remaining floor area is utilized for packeting seeds. Apart from 1500 square feet which is used for hand picking of peas by machines, the whole of the ground floor is used for the storage of chattels which are offered for sale by the appellants (Toogood & Sons, Ld.) and seeds awaiting dispatch. The basement is used for mixing fertilizers and for hand picking and grading potatoes. In addition seeds which are rejected for other purposes are ground down and converted into poultry and bird food." The case further states: "With the exception of a negligible quantity all seeds which come to the said hereditament are in a rough, unclean and impure state. All seeds are submitted to one or other of the treatments hereinafter mentioned, or to some similar treatment, and such treatment is a necessary preliminary to the sale of the seed in order to comply with the provisions of the

H. L. (E.)
1932
TOOGOOD & SONS, LD. v. GREEN.
Lord Thankerton.

Seeds Act, 1920 (10 & 11 Geo. 5, c. 54), or the standard required by the market in which the appellants trade. About 90 per cent. of the seed is within the provisions of the said Act and the Statutory Rules and Orders made thereunder." A detailed description of the methods of treatment is given, which it is unnecessary to recapitulate.

As regards the methods of disposal of their goods by the appellants, who are described as carrying on "the business of retail seedsmen," the case states that: "All the seeds above referred to are sold to customers other than the trade. A small quantity is sent to a retail shop occupied by the appellants in Southampton. As to the remainder, orders are received by the appellants at their aforesaid office and it is dispatched direct to their customers from the said warehouse in fulfilment of such orders." Further: "The aforesaid treatments are carried on as an integral part of the appellants' business of seedsmen. The appellants do not apply the said treatments or any of them to seeds belonging to third parties. The average quantity of packeted seeds dealt with by the appellants at the said hereditament over a period of the last three years amounts to 46 tons per annum, and the average quantity of seeds of all descriptions other than packeted seeds dealt with by the appellants at the said hereditament over the same period amounts to 1836 tons per annum."

It was not disputed by the Crown that, in view of the decision of this House in *Hines* v. *Eastern Counties Farmers' Co-operative Association, Ld.* (1), the cleaning and sorting of seeds in the present case, taken by itself, was a factory purpose, but they maintained that, looking at the other uses and occupation of the hereditament and the methods of disposal of goods carried on there, the hereditament was primarily used and occupied for the purposes of a retail shop within the meaning of the Act. In the course of the first hearing of the appeal your Lordships considered that the special case, which was adjusted before the recent group of decisions in this House under the Act, did not afford sufficient information as to the exact nature of the respective uses to which the

(1) [1931] A. C. 446, 456.

hereditament is put, and the various methods of disposal of the goods carried on in the premises, and the parties willingly undertook to adjust a further statement on the lines indicated by your Lordships. Accordingly, at the resumed hearing of the appeal, there were placed before your Lordships: (1.) a statement of additional facts agreed to and submitted by both parties, and (2.) a further statement of agreed facts submitted separately by the appellants. The second statement involved the correction of certain admitted errors in the special case, and the respondent was doubtful if he could competently agree to an alteration of the special case, but, if he could competently do so, he was willing to consent. Under s. 11 of the Quarter Sessions Act, 1849, the terms of the special case are settled by consent of the parties, subject to the order of a judge as provided, and, in my opinion, as also, as I understand, in the opinion of your Lordships, it is competent for the parties to consent to an amendment or alteration of the case, subject to the approval of the Court. I, therefore, proceed to deal with the special case as amended by these two statements.

Before dealing with the main question, three matters may be referred to in order to dismiss them as having no material bearing. First, parties were agreed that the small quantity of the goods sent by the appellants to their retail shop in Southampton is negligible and may be disregarded. Secondly, as already stated, a portion of the ground floor of warehouse No. 1 is used for the storage of chattels which are offered for sale by the appellants. Only 600 square feet are used for this purpose out of 10,332 square feet on that floor; none of these chattels are manufactured on the premises, and the annual turnover in them is about 700*l.*, which represents a very small fraction of the appellants' total annual turnover. This matter may also be disregarded. Thirdly, it now appears that the appellants do in fact clean seeds for other persons, but only to the negligible extent of about five or six tons per annum.

Along with and as part of the two statements submitted, there were supplied plans of the ground floor of warehouse

H. L. (E.)
1932
TOOGOOD & SONS, LD. v. GREEN.
Lord Thankerton.

No. 1 and of the three floors of the offices, and a number of photographs of these two buildings, both external and internal. These make quite clear that warehouse No. 1 is a modern factory warehouse in the ordinary sense, and that the offices are modern clerical offices, with no physical feature which would characterize them as an ordinary retail shop. Indeed, this was recognized by counsel for the Crown in the resumed argument, as he relied solely on the extended definition of "retail shop" provided by s. 3, sub-s. 4, of the Act.

The facts now agreed upon relative to the methods of disposal of the appellants' goods may be summarized as follows: The seeds sold by the appellants are not sold only to customers other than the trade, as originally stated. The annual turnover of these seeds is 1882 tons, which are disposed of as follows:—

A. 955 tons to customers other than the trade (the trade being taken as including market gardeners), who number about 100,000, comprising:

456 tons sold by travellers and agents, including certain sales at agricultural and horticultural shows throughout the country, and

499 tons ordered by letters addressed to the hereditament, or occasionally by telephone, without the intervention of travellers or agents.

It is stated that a few orders are received from customers actually calling at the offices. These orders only average about two a week, and there is no staff specially detailed to attend to customers so calling.

B. 927 tons to trade customers, of which about half is sold to shopkeepers and half to market gardeners; these customers number nearly 5000, and the sales are effected as follows:

710 tons by travellers and agents, including sales at shows, and 217 tons by letters addressed to the hereditament, or occasionally by telephone.

Of the staff employed by the appellants, 54 men and 66 women and girls are employed in warehouses Nos. 1 and 2, and 18 men and 60 women and girls are employed in the offices. The appellants issue a series of catalogues yearly,

H. L. (E.)
1932
TOOGOOD & SONS, LD. v. GREEN.
Lord Thankerton.

of which the three chief ones are: (1.) a farm seed book, which is distributed either by post or by travellers, mostly to farmers; (2.) and (3.) a larger and smaller (or abridged) general catalogue, copies of which are distributed mostly by post, and almost entirely to retail customers. These catalogues contain order forms. The appellants advertise in these catalogues certain articles which are not sold from the hereditament, but are dispatched direct by suppliers elsewhere on instructions given by the appellants on orders received by the appellants. These articles comprise beehives, motor mowers, rollers and garden furniture and ornaments. These sales, in my opinion, do not materially affect the question, and thus the sale of third parties' goods by the appellants may be ignored.

My Lords, a manufacturer must get rid of his production by sale, and the disposal of his goods involves normally a clerical staff to deal with the matter of disposal, which may conveniently be housed in the same hereditament; that of itself is therefore a normal and integral adjunct of a manufacturing business. On the other hand, a person who stocks only goods manufactured by others, and sells them in premises adapted for the accommodation of any member of the public who chooses to resort there for the purchase of some of these goods for his own consumption, is clearly carrying on a retail business in a retail shop. As already explained, the present case may be taken as one in which the appellants sell only goods manufactured by themselves, and in which they have no accommodation adapted for the purpose of the physical resort of customers. The orders for goods are almost entirely obtained outside the hereditament, but they are dealt with on the hereditament. While it may be a question whether market gardeners are retail customers or not, it is common ground that at least half of the amount sold is sold to retail customers. I may pause here to point out, first, that the test, as laid down in *Moon* v. *London County Council* (1), is as to what is done on the hereditament in question, irrespective of what is done outside the hereditament,

(1) [1931] A. C. 151.

H. L. (E.)
1932
TOOGOOD & SONS, LD. v. GREEN.
Lord Thankerton.

and, secondly, that the test is not whether the hereditament is mainly occupied and used for the purposes of "a retail business," but whether it is mainly occupied and used for the purposes of a "retail shop."

This House has dealt with the question of "retail shop," as defined, in three decisions. First, I may refer to the case of the baker's shop, *Finn* v. *Kerslake* (1), upon which the Court of Appeal mainly based their decision in the present case. The decision of the Court of Appeal was given on the present case as originally stated, but your Lordships found that statement unsatisfactory, and the case, as now amended, shows clearly that it is only by resort to the extended definition of "retail shop" in sub-s. 4 of s. 3 that the Crown can hope to bring this case within the proviso to sub-s. 1 of s. 3.

My Lords, I observe a tendency in certain of the judgments in the Courts below to put a wider construction than is justified on the views expressed in this House in *Finn's* case (1); those views—e.g., as to dissection of a unified business—are expressly confined to the facts of that case. Admittedly, there was a retail shop on the hereditament in that case through which the whole production was disposed of. Further, Scrutton L.J., in his opinion in the present case, appears to have misconceived the facts in *Gunn, Collie & Topping's* case (2), in which Lord Hunter expressed the views which were approved of by this House in *Finn's* case (1), for the whole of the tailor's bespoke business to which Lord Hunter was referring, from start to finish, was carried on in the same hereditament. The learned Lord Justice also refers to the case of *Pritchard* v. *Lewis (William) & Sons.* (3) Though I understand that an appeal was taken to this House, the appeal did not come before your Lordships, nor were the facts of the case referred to in the discussion on *Finn's* case (1) in this House. But, on a perusal of the facts stated in *Lewis's* case (3), it is at least doubtful whether, as inferred by the learned Lord Justice, the main bulk of the orders were received and dealt with in the small retail shop. But that

(1) [1931] A. C. 446, 457.
(2) 1930 S. C. 389.
(3) [1931] 1 K. B. 386, 456.

is a matter which should have been cleared up. In both *Finn's* case (1) and *Lewis's* case (2) there was admittedly a retail shop, and recourse to the extended definition was unnecessary; whereas, in the present case, the first question is whether the hereditament is used for the purposes of a retail shop, as defined, and I turn to the two decisions of this House which deal with this question.

These two decisions are *Turpin* v *Middlesbrough Assessment Committee* (3) and *Kaye* v. *Eyre Brothers, Ld.* (4), which were both cases of a garage and motor repair depot. They were both held to fall within the extended definition of a retail shop; and, in particular, under the express inclusion of repair work. As these decisions are relied on by the Crown in the present case, it is well to have regard to the facts of these cases, which will be found in the report of the cases in the Court below. (5) In *Turpin's* case (3) about half of the area was used for a repair workshop and space for cars while standing for repairs, a large part of the remaining space being used for entrance and exit of cars. In *Kaye's* case (4), out of a total of 590 square yards, 520 square yards were used for repair of cars and storage of cars undergoing or awaiting repairs. In delivering the judgment of this House in *Turpin's* case, Lord Dunedin says (6): "Upon the facts found this hereditament is primarily occupied and used for the purposes of repair work, done to cars and other objects brought or sent there by the owners, without the intervention of any middleman. I do not pause to inquire whether a person who does such repair work could not properly be said to be carrying on a retail trade or business. It may be that in strictness the words 'retail trade or business' are only applied with complete accuracy to cases of selling goods; or it may be that they may properly be applied to all trades and business which deal directly with the 'consuming' customer. In the present case all doubt is removed by the express inclusion of repair in the term 'retail trade or business.'"

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(1) [1931] A. C. 446, 457.
(2) [1931] 1 K. B. 386, 456.
(3) [1931] A. C. 446, 451.
(4) [1931] A. C. 446, 451.
(5) [1931] 1 K. B. 441, 442.
(6) [1931] A. C. 446, 473.

H. L. (E.)
1932
TOOGOOD & SONS, LD. *v.* GREEN.
Lord Thankerton.

With regard to the words "of a similar character," the noble and learned Lord says: "For myself, I am unable to state what are the physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion it is not possible to say that the words 'of a similar character,' even if they include, are limited to physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now, if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein. Moreover, once you include repair work in the words 'retail trade or business,' it can be truthfully said that there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop." This decision also covered *Kaye's* case. There can be no doubt that the resort of the public referred to was physical resort, on the facts of that case.

In the recent Scottish case of *Glasgow Assessor* v. *Henderson & Co.* (1), Lord Sands says: "It is quite true that in the case of *Turpin* (2) Lord Dunedin speaks of 'buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein'—I think that when he used the word 'can' he must have meant 'do,' because there are comparatively few manufacturers who would not, on occasion, welcome members of the public to their premises." I think this paraphrase is inaccurate, and that the true element is in the provision of accommodation in the premises for the public who may so resort, even if in fact the business is so unsuccessful that the public do not resort; but I agree with Lord Sands' remark in *Aberdeen Assessor* v.

(1) 1932 S. L. T. 145, 146.

(2) [1931] A. C. 446, 474.

Lumsden's Heirs (1), that Lord Dunedin's dictum is limited to such needs as can be supplied by retail purchase extended by statute to include the need to have an article repaired. Such accommodation was provided in both *Turpin's* case (2) and *Kaye's* case. (3) No such accommodation is provided in the present case. It is further to be noted in the present case that, of 1882 tons of seeds disposed of, 1160 tons are sold by travellers and agents outside the premises, and the rest are sold on orders by letters addressed to the premises from outside, which are a normal and necessary element in the disposal of his production by a manufacturer.

My Lords, I am clearly of opinion that this hereditament is not used and occupied to any material extent for the purpose of a retail shop, including any premises of a similar character where retail trade or business (including repair work) is carried on, and that it is an industrial hereditament within the meaning of s. 3. This, of course, does not affect or preclude any question of apportionment under s. 4.

Accordingly I am of opinion that the order of the Court of Appeal ought to be reversed, that the order of the King's Bench Division should be restored, and that the appellants should have their costs here and in the Court of Appeal.

VISCOUNT DUNEDIN. My Lords, the judgment which my noble and learned friend, Lord Thankerton, has just read is the judgment of the House in this case.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondent to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Case remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 13, 1932.

Solicitor for the appellants: *Herbert Smith.*
Solicitor for the respondent: *Treasury Solicitor.*

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(1) 1932 S. L. T. 158, 159.
(2) [1931] A. C. 446, 451.
(3) [1931] A. C. 446, 451.

1 All E.R. 834. TURNER.

Distinguished. BAKER v. TURNER [1950] A. C. 401

[HOUSE OF LORDS.]

H. L. (E.)* **BARRELL** (PAUPER) . . . . APPELLANT;

1932

AND

May 30.

FORDREE . . . . RESPONDENT.

Landlord and Tenant—Rent Restriction—Recovery of Possession—Dwelling-house—Effect of Sub-letting of Furnished Rooms—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12.

The tenant of a dwelling-house which was within the rental limits of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sub-let furnished three rooms of the house to one person and two rooms to another, reserving for herself merely one room and the scullery. The sub-tenants were given by the tenant the right as against herself to exclusive possession of the rooms in question. On becoming aware of the sub-letting the landlord of the house gave notice to terminate the tenancy, and thereafter took proceedings to recover possession of the rooms which had been sub-let:—

Held, that the rooms which had been sub-let had by virtue of s. 12, sub-s. 2, of the Act of 1920, become separate dwelling-houses to which the Act did not apply and therefore that the landlord was entitled to recover possession of those rooms.

Decision of the Court of Appeal [1931] 2 K. B. 257 affirmed.

APPEAL by the defendant from a decision of the Court of Appeal affirming an order of a Divisional Court whereby a judgment of the county court judge of Middlesex in favour of the defendant was set aside and judgment was entered for the plaintiff (the respondent) for possession of certain rooms in a house.

The question raised by the appeal was whether the Rent Restrictions Acts enabled a tenant after his tenancy had expired to retain as against his landlord possession of rooms which he had sub-let furnished.

The county court judge decided this point in favour of the tenant (the appellant). The Divisional Court (Lord Hanworth M.R. and Romer L.J., sitting as additional judges of the King's Bench Division) set aside the judgment of the county court judge and ordered that judgment be entered for the respondent for possession of the rooms sub-let furnished with costs, that the rent to be paid by the appellant to the respondent be apportioned by the judge of the county court, and that the appellant pay the respondent the costs of the appeal to that Court. The Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirmed the order of the Divisional Court.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, LORD MACMILLAN, and LORD WRIGHT.

The facts are set out in the report of the case before the Court of Appeal, and in the opinion of Lord Warrington of Clyffe, and they are summarized in the headnote.

1932. April 22, 25. *Sir George Jones* and *Archibald Safford* (with them *Plantagenet Dawn*) for the appellant. For the purpose of determining whether premises are premises to which the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925, apply, it is the letting by the landlord who seeks to recover possession that is relevant, not the sub-letting by the tenant to a sub-tenant who is no party to the proceedings. The letting by the respondent to the appellant in this case was of an unfurnished dwelling-house, let as a separate dwelling, of which the standard rent was such that the premises were within the limits of value prescribed by the said Acts. It follows that the said dwelling-house is a dwelling-house to which the said Acts apply. It is immaterial that the tenant sub-let part of it furnished to a third party who is no party to these proceedings. In the alternative it is submitted that the sub-letting by a tenant to a sub-tenant of part of a house furnished does not render the house or any part of it a dwelling-house to which the said Acts do not apply. In the further alternative it is submitted that the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925, are not enabling, but restrictive statutes. They afford a ground of defence for a tenant, not a cause of action for possession to a landlord. It follows in the submission of the appellant that the respondent must show a common law right to possession of the premises which he claims. Neither the common law nor the County Courts Act, 1888, s. 138 (which provides the machinery for enforcing a landlord's right

H. L. (E.)
1932
BARRELL
v.
FORDREE.

to possession of small houses of which the tenancy has expired), contemplates or authorizes the making of an order for possession of part of premises which are the subject of a single letting, and the respondent, being unable to prove a right to possession of the whole of the subject let cannot recover possession of any part thereof. *Spurling* v. *Pugh* (1) was wrongly decided.

[They also referred to *Ebner* v. *Lascelles* (2); *Glossop* v. *Ashley* (3); *Prout* v. *Hunter* (4); *Gidden* v. *Mills* (5); *Campbell* v. *Lill* (6); *Roe* v. *Russell* (7); *Haskins* v. *Lewis* (8); *Skinner* v. *Geary* (9); *Epsom Grand Stand Association* v. *Clarke* (10); *Bedford College* v. *Guest* (11); *Upton* v. *Townend.* (12)]

Sir Gerald Hurst K.C., *A. T. Denning* and *A. Grattan-Bellew* for the respondent were not called on.

The House took time for consideration.

1932. May 30. LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order dated April 27, 1931, of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirming an order dated March 3, 1931, of the King's Bench Division, whereby an order dated June 19, 1930, of the county court judge in favour of the appellant was set aside and judgment ordered to be entered for the respondent.

The question to be determined is whether, according to the true construction and effect of certain provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the Rent and Mortgage Interest Restrictions Act, 1923, respectively, and in the events which have happened, the landlord is entitled to judgment for the recovery of possession of certain rooms let furnished by the tenant in a dwelling-house, which as a whole is one to which the Acts apply.

(1) (1926) Estates Gazette, June 12, 1926.
(2) [1928] 2 K. B. 486.
(3) [1922] 1 K. B. 1.
(4) [1924] 2 K. B. 736.
(5) [1925] 2 K. B. 713, 727.
(6) (1926) 42 Times L. R. 397.
(7) [1928] 2 K. B. 117.
(8) [1931] 2 K. B. 1, 13, 18.
(9) [1931] 2 K. B. 546.
(10) (1919) 35 Times L. R. 525.
(11) (1920) 89 L. J. (K. B.) 586, 590.
(12) (1855) 17 C. B. 30.

The predecessor in title of the respondent let to the appellant as a weekly tenant at a weekly rent of 14*s*. 4*d*. an unfurnished dwelling-house known as No. 6 Ratcliffe Road, Forest Gate, in the county of Essex. This dwelling-house was one to which the Acts in question apply.

On January 25, 1924, the reversion expectant on the said tenancy was assigned to the respondent, and such tenancy was determined by a notice to quit expiring on May 5, 1930.

Prior to this date the appellant had sub-let three rooms on the top floor partly furnished at a weekly rent of 22*s*., and two rooms on the ground floor fully furnished at a weekly rent of 20*s*. She retained in her own possession one room and a scullery on the ground floor. The sub-tenants at all material times were in exclusive possession of the rooms let to them respectively.

On May 9, 1930, the respondent instituted proceedings in the county court for recovery of possession of the whole of the premises or alternatively of the parts sub-let furnished. He subsequently withdrew his claim for possession of the entirety, and the only question is as to his right to recover possession of the parts sub-let furnished.

This question turns on the true construction and effect of certain provisions of the Acts of 1920 and 1923, which I will now state.

By s. 4 of the Act of 1923 it was provided that the following section should be substituted for s. 5 of the principal Act (that of 1920), namely: " 5.—(1.) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless "—there then follows an enumeration under heads (*a*)—(*i*) inclusive of facts and circumstances, none of which are material to the present question except: " (*h*) The tenant without the consent of the landlord has at any time after the Thirty-first day of July, 1923, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let." I only mention this provision (which does not apply to the present case) in order to show that I have not forgotten it.

The section also contains the following sub-section—namely: "(5.) An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenants."

I now return to the Act of 1920.

In ss. 9 and 10 there are contained certain provisions for limiting the rent which may be charged on a dwelling-house to which the Act applies, or any part thereof let at a rent which includes payment for the use of furniture, and for imposing a penalty for the charging of extortionate rents in such cases.

Sect. 12 (the interpretation section) contains the following material provisions—namely:—

"(*f*) The expressions 'landlord' and 'tenant' include any person from time to time deriving title under the original landlord or tenant.

(*g*) The expressions 'tenant' and 'tenancy' include sub-tenant and sub-tenancy and the expression 'let' includes 'sub-let.'

(2.) This Act shall apply to a house or a part of a house let as a separate dwelling . . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies:

Provided that (*i*) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payment in respect of board, attendance or use of furniture."

"(8.) Any rooms in a dwelling-house subject to a separate letting, wholly or partly as a dwelling, shall for the purposes of this Act be treated as part of a dwelling-house let as a separate dwelling."

My view on the construction and effect of these statutory provisions in the events which have happened may be very shortly stated.

The respondent as landlord had when he instituted the present proceedings a common law right to recover possession of the entire house. The Acts prevent him from obtaining a judgment giving effect to this right in respect only of a dwelling-house to which the Act of 1920 applies.

In the events which have happened the dwelling-house originally let has, for the purposes of the Acts, been divided into three separate dwelling-houses (Act of 1920, s. 12, sub-s. 2), consisting of (*a*) the two rooms retained by the original tenant; (*b*) the two rooms on the ground floor; and (*c*) the three rooms on the upper floor. But dwelling-houses (*b*) and (*c*), being bona fide sub-let at rents which include payments in respect of the use of furniture, are excluded from the category of dwelling-houses to which the Act applies: (Proviso to the above mentioned sub-section). It follows that in their case the common law right of the respondent is unaffected by the Act, and he is entitled to the order he has obtained.

I am unable to agree with Greer L.J. that the provision in s. 12, sub-s. 2, that a part of a house let as a separate dwelling shall be deemed to be a dwelling-house to which the Act applies, is by the proviso made inapplicable to the portions (*b*) and (*c*) mentioned above. So to read the proviso would logically be to prevent any provision in the Act from being applicable to "a dwelling-house bona fide let at a rent which includes payments in respect of the use of furniture," e.g., the provision in s. 12, sub-s. 1 (8.), that "let" includes "sub-let." I cannot believe that the proviso can be so read. The expression "a dwelling-house to which this Act applies," wherever it occurs, connotes, as I understand it, a dwelling-house which is subject to the restrictions imposed upon the landlord by the Act, and it is in this sense that I read the words "this Act shall not apply" in the proviso. But if I am wrong in this view, then I agree with Greer L.J. that the portions I have called (*b*) and (*c*) have, as a consequence of the manner in which they have been dealt with by the tenant, become in fact separate dwelling-houses within the meaning of the Act, and as such are unaffected by the restrictions contained in the amended s. 5 of the Act of 1920.

Lord Warrington of Clyffe.

I have not thought it necessary to discuss the cases cited to us. There is no decision among them which is binding on this House, and in my opinion the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases. Of course, if a case is found which is in conflict with the opinion so formed then it must be dealt with, but there is no such case here.

I see no difficulty in making a proper apportionment of the rent as between the rooms retained by the appellant and those recovered by the respondent. Sect. 12, sub-s. 3, of the Act of 1920 gives ample powers for that purpose.

In my opinion the appeal should be dismissed, but, as the case is a pauper case, without costs.

LORD THANKERTON. My Lords, I concur in the opinion which has just been expressed by my noble and learned friend and in the conclusion at which he arrives.

LORD TOMLIN. My Lords, I also concur, and I am authorized to say that my noble and learned friends, Lord Macmillan and Lord Wright, also concur.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, May 30, 1932.

Solicitors for the appellant: *Bishop & Fenton-Jones.*
Solicitor for the respondent: *Herbert A. Phillips.*

[PRIVY COUNCIL.]

J. C.*
1932
July 27.

ASPRO, LIMITED . . . . APPELLANTS;

AND

COMMISSIONER OF TAXES . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Income Tax—Assessment—Deduction—Company—Directors' Fees—Resolution of Company—Land and Income Tax Act, 1923 (*No.* 21 *of* 1923; *N. Z.*), *s.* 80, *sub-s.* 2.

Although the amount of remuneration paid by a company incorporated in New Zealand is that fixed by a resolution at a general meeting, in accordance with the articles of association, the Commissioner of Taxes in assessing the company to income tax under the Land and Income Tax Act, 1923, can inquire whether the amount was an expenditure "exclusively incurred in the production of the assessable income," so as to be a permissible deduction under s. 80, sub-s. 2, of the Act; the grounds upon which a deduction of the amount so fixed can be challenged are not confined to the payment being wholly or in part not remuneration for the directors' services. Where a deduction of an amount so fixed has been disallowed in part, and the evidence is not confined to proof of the resolution and payment thereunder, the question is whether the company fully satisfied the onus under ss. 14 and 25 of showing that the assessment is excessive; in the present case that onus was not discharged.

Judgment of the Court of Appeal of New Zealand [1930] N. Z. L. R. 935 affirmed.

APPEAL (No. 81 of 1931) from a judgment of the Court of Appeal of New Zealand (August 29, 1930) affirming an assessment to income tax upon the appellants.

The appellants were incorporated as a private company in New Zealand, and the assessment was made under the Land and Income Tax Act, 1923, of New Zealand, in respect of the year to March 31, 1929.

The question at issue was whether the appellants were entitled to deduct from the company's profits the whole of a sum of 10,000*l.*, which had been fixed as the directors' remuneration for the year by a resolution passed at a general meeting of the company, in accordance with the articles of association, and had been paid to the two directors equally.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR JOHN WALLIS.

The Commissioner of Taxes had disallowed the deduction as to 8000*l.*, being of opinion that to that extent it was not shown to have been an expenditure "exclusively incurred in the production of the assessable income," as required by s. 80, sub-s. 2, of the Act. The assessment was affirmed by the stipendiary magistrate.

An appeal by special case to the Supreme Court, having been transferred to the Court of Appeal for hearing, was dismissed by Herdman and Blair JJ., Myers C.J. dissenting. The learned Chief Justice was of opinion that the fees having been fixed by resolution in accordance with the articles the deduction claimed could not be disputed.

The facts and the material statutory provisions appear from the judgment of the Judicial Commitee.

1932. June 21, 23. *Latter K.C.* and *G. O. Slade* for the appellants.

W. A. Greene K.C. and *G. R. Blanco White* for the respondent.

Reference was made to *Inland Revenue Commissioners* v. *Blott* (1); *Inland Revenue Commissioners* v. *Sansom* (2); *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (3); *Johnson Brothers & Co.* v. *Inland Revenue Commissioners* (4); *Ward & Co., Ld.* v. *Commissioner of Taxes* (5); *Moore* v. *Stewarts & Lloyds, Ld.* (6); and (as to power to disallow a deduction in part) to *Roberts* v. *Hopwood.* (7)

July 27. The judgment of their Lordships was delivered by

Lord Thankerton. This is an appeal from a judgment of the Court of Appeal of New Zealand dated August 29, 1930, dismissing an appeal from a judgment of the stipendiary magistrate of the Wellington District dated December 12, 1929, dismissing an appeal against the assessment to income tax made on the present appellants by the present respondent in respect of the year to March 31, 1929.

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(1) [1921] 2 A. C. 171.
(2) [1921] 2 K. B. 492.
(3) [1915] A. C. 433.
(4) [1919] 2 K. B. 717.
(5) [1923] A. C. 145.
(6) (1906) 8 F. 1129.
(7) [1925] A. C. 578, 585.

The appellants' trading account for the year to March 31, 1928, which fell to be treated as the income year for the purpose of the assessment, showed a debit item of 10,000*l.* in respect of directors' fees, which they claimed as a proper deduction. But the respondent disallowed this item to the extent of 8000*l.*, on the ground that, to that extent, it was not exclusively incurred in the production of the assessable income, and he assessed the appellants accordingly; the appellants challenge the assessment in this respect.

The provisions of the Land and Income Tax Act, 1923, as to deductions, so far as material, are as follows: "80.—(2.) In calculating the assessable income of any person deriving income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year. . . . . Save as herein provided, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer."

The statute provides a special code by which a taxpayer, who is dissatisfied with the assessment made by the Commissioner, may appeal against it, but it must first be noted that, under s. 14, the taxpayer is made liable to pay the tax as assessed by the Commissioner "save in so far as he establishes on objection that the assessment is excessive or that he is not chargeable with tax." The special procedure for appeal by way of objections to assessments is contained in ss. 22 to 38, of which the following provisions are material: As regards procedure in the magistrate's court, s. 25 provides: "On the hearing and determination of all objections to assessments of land-tax or income-tax the burden of proof shall be on the objector, and the Court may receive such evidence as it thinks fit, whether receivable in accordance with law in other proceedings or not."

Where, as here, the amount in dispute exceeds 200*l.*, a right of appeal to the Supreme Court from the determination of the magistrate is given on both law and fact and, on such appeal being taken, s. 30 provides that the magistrate should

J. C.
1932
Aspro, Ld.
v.
Commissioner of Taxes.

state and sign a case setting forth the evidence taken before his court and the questions of law arising for the determination of the Supreme Court. As the present case only raised a question of law, it was removed, with the consent of parties, from the Supreme Court into the Court of Appeal under the provisions of s. 33.

It will thus be seen that in the present appeal the power of review of their Lordships is limited to questions of law, and that the appellants have to discharge the burdens laid upon them by ss. 14 and 25.

The material facts may be summarized as follows: The company was incorporated in 1923 as a private company, and since then has carried on business in Wellington as manufacturers and vendors of a patent medicine which is known as "Aspro," and sold in tabloid form.

The capital of the company consists of 20,000 fully-paid up shares of 1*l.* each, of which Messrs. G. R. Nicholas and A. M. Nicholas each hold 10,000 shares. These shares, along with 50,000*l.* debentures, were given by the company to the Messrs. Nicholas as consideration for an exclusive licence to use the trade mark "Aspro," and to deal in the commodity in New Zealand. Throughout the existence of the company the Messrs. Nicholas have been the sole directors of the company as well as the sole shareholders.

The company's trading year ended on March 31 in each year, the first year's accounts covering only nine months' trading. The directors' fees were fixed towards, or after, the end of each trading year. The following table shows the amount of the fees in each year, the date when they were fixed and the net profits left to the company after deduction of the fees:—

Year ending.	Date Directors' fees were fixed.	Fee fixed for each Director.	Net profit left to Appellants.
March 31, 1924	March 27, 1924	£1,500	£1,418 9 10
March 31, 1925	March 16, 1925	£2,500	£2,616 14 10
March 31, 1926	July 1, 1926	£3,250	£3,170 11 8
March 31, 1927	June 21, 1927	£5,000	£4,924 13 7
March 31, 1928	June 8, 1928	£5,000	£5,145 6 6

These fees were fixed each year by resolution of the company in general meeting. The company having adopted Table "A" of the New Zealand Companies Act, 1908, the remuneration of the directors is provided for by article 78, which is as follows: "The directors shall be paid out of the funds of the company, by way of remuneration for their services, such sum or sums as the company may from time to time fix at a general meeting, and such remuneration shall be divided amongst them in such proportions as the directors may determine." Prior to the year ended in March, 1928, the amount so fixed was accepted as a proper deduction for income tax purposes by the Commissioner.

The two directors in question reside in Melbourne and direct the policy of the New Zealand company from there. The parent company is an Australian company, and there is also a subsidiary English company, and the Messrs. Nicholas are also directors of these two companies. A comparison of the monthly sales of these three companies shows that the volume of the Australian business is about eight times, and the volume of the English business about eleven times, that of the New Zealand business. There is a local manager in Wellington, who acts under the direction of Melbourne; weekly samples of the mixtures made in Wellington are sent to Melbourne, which are tested by Mr. G. R. Nicholas, and the result is reported by him to Wellington. The manager stated that about three letters each way would pass between Wellington and Melbourne, and that about one letter in six of those sent by him would be referred to the directors. While it was stated that the directors paid periodical visits to New Zealand, it was admitted that neither of them had been in New Zealand in the year in question. They declined to give the respondent information as to the amount of time spent by them in New Zealand since the inception of the company, and neither of them appeared to give evidence before the magistrate.

The appellants maintained, in the first place, that the production by them of a resolution fixing the remuneration of the directors for their services in terms of article 78, and vouchers for payment of the amounts so fixed, when taken along with the admitted fact that services had been rendered, was sufficient to exclude any further inquiry by the Commissioner and to entitle them to a deduction in terms of s. 80, sub-s. 2, of the Act. But this contention was not seriously pressed, and, in their Lordships' opinion, it is untenable.

The appellants maintained, in the second place, that the Commissioner was not entitled to challenge the amount paid by the company to its servants for their services on the ground of excess or over-generosity in its amount, for that was entirely a matter in the discretion of the company, and that he could only challenge such payments on the ground that it was not a genuine transaction, being in fact fictitious or the sums so paid being, wholly or partly, not truly paid as remuneration for their services. They maintained that, in the present case, there was no evidence to justify any such ground of challenge by the Commissioner and that, accordingly, the magistrate was bound to sustain the appellants' objections and to hold that the assessment was excessive. The respondent substantially accepted the premises of this contention, but he maintained that the state of the evidence was such that the appellants had failed to establish that the assessment was excessive, as required by s. 14, or to discharge the burden of proof laid on them by s. 25.

In their Lordships' opinion, there is no material difference between these two aspects of the argument for present purposes, and the true issue is whether there was evidence before the magistrate on which he was entitled to refuse to hold it proved that the 10,000*l.* had been exclusively incurred in the production of the assessable income and that the assessment was excessive. If the only evidence before him had been the company's resolution fixing the directors' fees and vouchers for payment of the amounts so fixed, it is difficult to see how the magistrate could reasonably have refused to hold that the assessment was excessive, and the question must be whether there was further evidence which reasonably entitled the magistrate to decline to hold it proved that the assessment was excessive.

Their Lordships are of opinion that the state of the evidence was not such as to compel the magistrate to the conclusion that the 10,000*l*. had been exclusively incurred in the production of the assessable income. There was complete identity of the persons interested as shareholders in fixing the amount of the fees to be paid to the directors and of the persons to whom the fees were to be paid, and, except in regard to its bearing on the liability of the company to tax, it made no difference to the destination of the money whether the amount of the fees represented fair remuneration for the directors' services or not. The Messrs. Nicholas, who, as sole shareholders and sole directors, alone knew how the fees came to be fixed, not only declined to allow the respondent to examine them on this matter, but did not come forward to give evidence before the magistrate, although the burden of proof was upon them. Further, in this situation, it is not irrelevant to take also into account that in each year the fixing of these fees was made when a fair estimate of the trading results for the year was available and that in each year, of the balance available for directors' fees and for distribution among the shareholders, about two-thirds was apportioned to directors' fees. In their Lordships' opinion, the magistrate was entitled to hold that the appellants had failed to prove that the 10,000*l*. had been exclusively incurred in the production of the assessable income.

None of the authorities cited appear to have much bearing on the present case, except possibly the case of *Johnson Brothers & Co.* v. *Inland Revenue Commissioners* (1), in which the sums paid to the owner's sons, who were employed in the business, were disintegrated, on the evidence of the owner himself, into the amount of a fair wage and a balance which "might be considered as paid on account of family feeling"; but there was nothing equivalent to the resolution of the company in the present case.

For these reasons their Lordships are of opinion that the judgments appealed from were right and that the appeal

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(1) [1919] 2 K. B. 717.

J. C.
1932
Aspro, Ld.
v.
Commissioner of Taxes.

should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Stafford Clark & Co.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.*
1932
July 27.

WINNIPEG ELECTRIC COMPANY . . . Appellants;

AND

JACOB GEEL . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Manitoba)—Negligence—Motor Vehicle—Onus of Proof—Uncontradicted Evidence of inevitable Accident—Function of Jury—Motor Vehicle Act (Consolidated Amendments, 1924, *c.* 131; *Manitoba), s.* 62.

Under s. 62 of the (Manitoba) Motor Vehicle Act, which provides that when any injury is caused to a person by a motor vehicle the onus of proof that the injury did not arise through his negligence shall be upon the owner or driver of the motor vehicle, the onus of negativing negligence in an action for damages so caused remains on the defendant throughout the proceedings. Thus, although the defendant has adduced the evidence of credible witnesses that the accident was due to a latent defect in the mechanism of the motor vehicle and the plaintiff has adduced no evidence to the contrary, the case should not be withdrawn from the jury but should be left to them to decide by their verdict whether the defendant has satisfied the statutory onus of proof.

Judgment of the Supreme Court of Canada [1931] S. C. R. 443 affirmed.

Appeal (No. 13 of 1932) by special leave from a judgment of the Supreme Court of Canada (June 12, 1931) affirming a judgment of the Court of Appeal for Manitoba (May 13, 1930) which dismissed an appeal from the judgment of Dysart J. at the trial with a jury of an action in the Supreme Court of Manitoba.

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* *Present:* Lord Tomlin, Lord Thankerton, Lord Macmillan, Lord Wright, and Sir George Lowndes.

J. C.
1932
Winnipeg Electric Co.
v.
Geel.

The respondent brought an action in the Supreme Court of Manitoba to recover damages for personal injuries resulting from the stationary motor-car in which he was seated being struck by the appellants' motor omnibus. The jury found that the injuries were caused by the negligence of the appellants in not keeping the brakes and braking equipment of their omnibus in proper repair and by not sufficiently inspecting them; they assessed the damages at $10,000, for which sum judgment was entered.

The appeal was as to the effect of s. 62 of the Motor Vehicle Act (Consolidated Amendments, 1924, c. 131; Manitoba) with regard to the onus of proof.

The facts, the terms of the section, and the appellants' contentions appear from the judgment of the Judicial Committee.

The judgments in the Supreme Court of Canada, which unanimously affirmed the decision of a majority of the Court of Appeal of Manitoba dismissing the defendants' appeal, is reported at [1931] S. C. R. 443.

1932. July 4, 5. *Pritt K.C.* and *Coleman K.C.* for the appellants.

Newcombe K.C. and *E. R. Chapman* for the respondent were not called upon.

July 27. The judgment of their Lordships was delivered by

Lord Wright. In this case the respondent, who was plaintiff in the action, was awarded by a jury the sum of $11,158.25 as damages for personal injuries sustained by him by reason of the negligence of the appellants, who were owners of the motor omnibus which caused the injuries. The judgment for these damages was upheld by a majority of the Court of Appeal for Manitoba, and that judgment was affirmed by the Supreme Court of Canada. The appellants by this appeal are raising questions on the construction of certain sections of the Act in force at all material times, the Manitoba Motor Vehicle Act.

The material section is s. 62, which is in the following terms: "When any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger or be likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the motor vehicle."

Reference was also made to s. 15, which reads as follows: "Every motor vehicle shall be equipped with adequate brakes, sufficient to control such motor vehicle at all times, and also with suitable bell, gong, horn, or other device which shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle." That section, however, is a penal clause involving penalties for its breach under s. 52 of the Act, and is not material in a case of civil liability such as the present; it may accordingly be disregarded for the present purpose.

The facts of the case are very simple: On April 22, 1928, at about 9 p.m. in Winnipeg, the respondent was sitting in the rear seat of an open touring car which was held up for the moment at a street-crossing by the traffic signals. While thus stationary the car was heavily run into from behind by the appellants' motor omnibus. The respondent sustained serious cerebral injuries as the result of the violent jerk, which developed into paralysis agitans involving it may be total and permanent disablement.

It appeared that the brakes of the omnibus had failed to act, so that, notwithstanding the efforts of the driver, the omnibus crashed into the back of the car in which the respondent was seated. The failure of the brakes was, according to some of the appellants' evidence, due to the loss or breaking of a small pin in one end of the brake evener or equalizer, thereby interrupting the operation of the braking system, both in regard to the pedal or service brake and to the hand or emergency brake, since both depended on the same evener. But the evidence led on this point by the appellants may be thought to have failed in accuracy and completeness. The pin itself was not preserved or produced, and the evidence of the mechanic who repaired the omnibus later is difficult to reconcile with that of the appellants' superintendent of the 'bus and brake equipment. The omnibus itself was the only one of that type owned by the appellants, who operated in all forty-nine omnibuses, and had been bought second-hand some few years before. The appellants had no other omnibuses equipped with similar braking apparatus. Evidence as to inspection of the omnibus was given by the appellants. The practice was stated to be to give the machinery what was called a light inspection after every 750 miles of running, and a complete overhaul after every 5000 miles, but the omnibus in question had nevertheless run 1000 miles since the last light inspection, about two months before; the pin was said to be one about which, as it did not wear and had no lost motion, the inspectors would not bother, except just to see that it was all right and had got a cotter pin in it. The evidence was that up to the moment of the accident the brakes had worked efficiently, but the appellants' witnesses who spoke of the inspections may well have produced in the jury's mind the impression that they had no specific recollection and were rather speaking of routine and from records.

The jury at the trial after a direction from the trial judge, which was not objected to before this Board, gave their verdict as follows: (1.) Was there any negligence on the part of the defendants which caused the injury to the plaintiff? Answer: Yes. (2.) If you find there was such negligence, in what particulars as alleged in the statement of claim did that negligence consist? Answer: Paragraph (*f*), in not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes. (3.) If you find such negligence, at what do you assess the damages of the plaintiff? Answer: Ten thousand dollars ($10,000.00), plus expenses as agreed to by counsel.

The jury added the following rider: We find that the driver did everything possible under the circumstances to avoid this accident, and we wish to exonerate him from any blame. This rider was not, however, included in the verdict.

On this verdict judgment was entered on December 5, 1929, for the respondent for $11,158.25 and costs.

By his statement of claim the respondent had given very detailed particulars of negligence, but it was not contended before this Board that by doing so he had in any way waived his right to rely as against the appellants on the statutory presumption of negligence contained in s. 62 of the Act quoted above, though having regard to that presumption specific particulars of negligence need not have been pleaded. The appellants, in addition to formal denials, pleaded by way of defence to the whole cause of action, "that the accident in question was inevitable." This plea depended on the allegation that the accident was due to a latent defect in the braking mechanism; that is, to something which could not have been avoided by the exercise of ordinary care and caution and skill, to paraphrase the definition given in *The Marpesia* (1) and repeated in *The Merchant Prince* (2) by Fry L.J. In support of this plea the appellants relied on evidence that all proper inspections had been made. It is clear from the findings of the jury that the jury did not accept this plea.

But Mr. Pritt has strenuously argued on various grounds that that plea should have succeeded. His contentions may be thus summarized: while admitting that s. 62 of the Act places the burden on the appellants to disprove negligence, yet, he contended, if there is no evidence of negligence apart from the statutory presumption, and the defendants adduce evidence, by witnesses whose credibility is not attacked, that they were not negligent, then the onus is discharged by the defendants and, if the matter rests there, the judge ought to withdraw the case from the jury and non-suit the plaintiff on the ground that the evidence as to negligence is all one way; in other words, what Mr. Pritt has contended is that the defendants' evidence, being the only evidence on the issue of negligence, has displaced the statutory

(1) (1872) L. R. 4 P. C. 212.

(2) [1892] P. 179, 190.

presumption, and constitutes a preponderance of evidence on that issue which justifies, or indeed requires, a judgment to be entered for the defendants.

Their Lordships cannot accept this view of the operation of the section. Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements —i.e., that he was injured by the defendant and the extent of his damages; as to the second, the onus is removed from his shoulders, and if he establishes the two matters in respect of which the onus still remains on him, he may close his case, because it is then for the defendant to establish to the reasonable satisfaction of the jury that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame, because neither party could avoid the other. But the onus which the section places on the defendant is not in law a shifting or transitory onus: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. A fortiori the defendant will be held liable if the evidence actually establishes his negligence. No doubt the question of onus need not be considered if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury.

Furthermore, in their Lordships' judgment, there is no justification for Mr. Pritt's contention that the judge should have withdrawn the case from the jury, because the plaintiff tendered no evidence of negligence but left the appellants' evidence that there was no negligence to stand as the only evidence on that issue. The judge could not non-suit the respondent as plaintiff on the issue of negligence, because the plaintiff was entitled to rely on the statutory presumption that the defendants were negligent, and to leave them to discharge that onus if they could. No doubt the plaintiff could have been non-suited if he had brought no evidence that he was injured, but he could not be non-suited on the ground that he had called no evidence of negligence, because on that issue the onus was not on him. Nor could the judge non-suit the plaintiff, even if he believed the defendants' witnesses and accepted the view that these witnesses established absence of negligence on the defendants' part. So to do would be for the judge to usurp the functions of the jury, who are judges of fact both as to the credibility of witnesses and as to the sufficiency of evidence to establish a case or discharge an onus. A judge, confronted by a jury, can indeed say in proper cases what evidence is in law not sufficient to be considered by a jury, but he cannot decide that the evidence is such that it is sufficient to satisfy the jury, nor can he non-suit a plaintiff because he thinks the defendant has discharged the onus which rests upon him. In the words of Willes J. in *Ryder* v. *Wombwell* (1), quoted

(1) (1868) L. R. 4 Ex. 32, 38.

with approval by Lord Atkinson in *Banbury* v. *Bank of Montreal* (1), the question: "in so far as it is a question of fact it must be determined by the jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case . . . . a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a non-suit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

If these words are applied to the case now under discussion, it is clear that the judge could not non-suit the plaintiff, for the reason that the onus of negligence did not rest on the plaintiff, nor could he enter judgment for the defendants simply because the defendants had called some evidence in order to satisfy the onus which rested on them—i.e., to disprove that they had been negligent. It was for the jury to give their verdict on that evidence. Hence there was in this case no question of withdrawing the case from the jury. The matter having been duly put to the jury, their Lordships do not think it can be said that the verdict of the jury was perverse, or without evidence or contrary to the weight of the evidence, because the plaintiff had at his command the statutory presumption, and it was entirely for the jury to say whether they were satisfied on the evidence, which in this case may well have left room for doubt, that the defendants had discharged that onus.

Mr. Pritt relied in support of his contentions on the language of Harvey C.J., in *Carnat* v. *Matthews* (2), in a case under similar words in the corresponding statute of Alberta. The learned Chief Justice says: "In a case such as this where the rule of the statute applies, the plaintiff in the first instance need do no more than show that he sustained damage from a motor vehicle. Then in the absence of evidence by the defence he is entitled to succeed because

(1) [1918] A. C. 626, 670.

(2) (1921) 16 Alberta L. R. 275, 277.

the statute makes a case of presumptive negligence, but when the defendant gives his evidence, if it is sufficient by itself to make a prima facie case of absence of negligence, and the plaintiff his evidence in rebuttal (sic), the case is much the same as any damage action. The side which has the preponderance of evidence on the question of negligence should win. It should thus appear that when once the defendant has made out a prima facie case of absence of negligence, by evidence, which, of course, the Court or jury accepts as reliable, the rule res ipsa loquitur, or, in this case the rule of the statute, has no further application."

Their Lordships cannot for reasons already given accept this as a correct statement of the law. In their Lordships' opinion the rule applicable in such cases is correctly stated by Turgeon J.A. in a case under similar legislation in Saskatchewan, *Stanley* v. *National Fruit Co.* (1): "Section 43 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle. His duty to others remains the same, notwithstanding the shifting of the burden of proof. He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more,

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(1) (1929) 24 Saskat. L. R. 137, 141.

J. C.
1932
WINNIPEG ELECTRIC CO.
v.
GEEL.

is required of him except in cases specially provided for, with which we are not concerned here."

Their Lordships also agree with the statement of the principle made by Duff J. in the following words in his judgment in the Supreme Court in the present case (1): "The statute creates, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed."

The position of the defendants under the statute is thus analogous to the position of the defendant in a case to which the principle often called res ipsa loquitur applies. The law applicable to such a case is thus, for example, stated by Fry L.J., in *The Merchant Prince* (2): "It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (3), it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to show inevitable accident."

The learned Lord Justice proceeds to show how serious that burden may be. It is not necessary in the present case to decide whether or not the matter is one to which the principle res ipsa loquitur applies, but the rule as to burden of proof is the same under the statute. Nor is it necessary further to emphasize that in some running-down cases under the statute the defendant may discharge the burden, as already explained, by other evidence than that of inevitable accident.

The two judges in the Court of Appeal who dissented appear to have proceeded on the ground that the verdict

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(1) [1931] S. C. R. 443, 446.

(2) [1892] P. 179, 189.

(3) (1886) 11 P. D. 114.

J. C.
1932
WINNIPEG ELECTRIC CO.
v.
GEEL.

of the jury was perverse. Their Lordships do not take this view, but in any case, on the view taken by these learned judges, the proper order would not have been to dismiss the claim but to order that there should be a new trial, for reasons already set forth.

Their Lordships are of opinion, in the result, that the appeal should be dismissed. The appellants will pay the costs, which, in accordance with the undertaking given by the appellants when special leave to appeal was granted, will be upon the scale of solicitor and client. Their Lordships will humbly so advise His Majesty.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Maude & Tunnicliffe.*

[PRIVY COUNCIL.]

J. C.*
1932
July 28.

CITY OF MONTREAL . . . . . . APPELLANTS;

AND

MONTREAL INDUSTRIAL LAND COMPANY, LIMITED . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—City of Montreal—Cost of Street Paving—Liability of Frontagers—Construction of Statutes—General Act superseding Special Act—1 Geo. 5, c. 48 (Quebec), s. 62—18 Geo. 5, c. 97 (Quebec), s. 15.

By a Quebec statute of 1910 the City of Montreal within six months was to macadamize certain streets, including S. Street, in a township thereby annexed to the City, but later statutes postponed until May, 1925, the date for completing the work. In 1910 the City had no power to charge the cost of paving streets against the frontagers, but statutes of 1911 and 1914 gave the City that power in the case of permanent paving. In July, 1925, the City passed a resolution that S. Street, which had not been macadamized, should be permanently paved and that the frontagers thereon should be taxed in respect of the cost. Accordingly, S. Street was permanently paved with asphalt. In 1928 the respondents, as frontagers, were assessed to tax under a statute of that year, which provided that the cost of all pavings laid since January 1, 1919, should be charged to the frontagers at a specified rate. All the statutes above mentioned were enacted as amendments of the City's statutory charter of 1899.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

Held, that having regard to the specific terms of the statute of 1928 it applied to S. Street, notwithstanding the unfulfilled obligations of the City under the statute of 1910, and that accordingly the assessment was valid.

Judgment of the Supreme Court of Canada reversed.

APPEAL (No. 83 of 1931) by special leave from a judgment of the Supreme Court of Canada (June 23, 1931) reversing a judgment of the Court of King's Bench for the Province of Quebec (December 12, 1930) which affirmed the judgment of a judge of the Supreme Court of that Province.

The respondents, who were proprietors of land adjoining Sherbrooke Street, in the Longue Pointe Ward of Montreal, sued the appellant City in the Superior Court for a declaration that an assessment to tax made upon them in 1928 in respect of the cost of permanently paving Sherbrooke Street was invalid.

The facts of the case and the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada by a majority (Anglin C.J. and Rinfret and Smith JJ.; Lamont and Cannon JJ. dissenting) held, reversing the two lower Courts, that the assessment was invalid.

1932. July 8, 11. *Beaulieu K.C.* and *Saint Pierre K.C.* for the appellants.

Geoffrion K.C. for the respondents.

July 28. The judgment of their Lordships was delivered by

LORD WRIGHT. In this appeal the appellants, the City of Montreal, were defendants in the action and were resisting a claim by the respondents, the plaintiff company, that the Court should set aside an assessment made on them in respect of the cost of certain works of paving executed by the appellants on a road or street called Sherbrooke Street, the respondents being frontagers or bordering owners. The district in which that street was had before 1910 formed

J. C.
1932
MONTREAL CITY
v.
MONTREAL INDUSTRIAL LAND CO.

part of the town of Longue Pointe, but in 1910 that town was annexed by the appellants and included in the City of Montreal as part of a larger scheme for the enlargement of the City boundaries. To carry out these annexations an Act was passed in 1910 by the legislature of the Province of Quebec, Statutes of Quebec, 1 Geo. 5, c. 48—which amended the charter of the City of Montreal, embodied in Statutes of Quebec, 62 Vict. c. 58 (1899); by art. 1 (i) (I) of this amending Act a number of provisions were enacted relating to the annexation of the town of Longue Pointe, which was to form a ward of the appellant City under the name of Longue Pointe Ward, the City was to do various works of public utility within certain periods, certain privileges were to be granted to the inhabitants and in particular certain streets or highways, including Sherbrooke Street, were to be opened and macadamized within six months from the date of the sanction of the Act. At the date of the Act the appellant City had general powers under its charter to open up streets, but there were no specific provisions then in force as to charging the frontagers for such work: an Act of 1908 (Statutes of Quebec, 8 Edw. 7, c. 85), by s. 14, had repealed the statutory provisions in art. 455 of the charter, enabling the appellant City in certain events to charge one half of the cost of paving to frontagers. It has been assumed before their Lordships in this appeal, and rightly assumed, that the cost of macadamizing under the Act of 1910 would come out of the general fund of the appellant City and be borne by the ratepayers generally, without any specific charge being made on the respondents. The appellants did not execute the various works under the Act of 1910 within the statutory period. Accordingly, by an Act of 1912 (Statutes of Quebec, 3 Geo. 5, c. 54), s. 48, it was provided that "without otherwise amending the charter of the City the latter shall have until January 1, 1915, to complete the work it has undertaken to do" by the annexation Act referred to above, which included among many others the works at Longue Pointe. The section added: "and until that date no judicial proceeding by mandamus or otherwise shall be taken or maintained against the City to compel it to execute the said works." Finally, after similar statutory extensions in 1915, 1918, and 1920, it was enacted in 1921 (Statutes of Quebec, 11 Geo. 5, c. 111), by s. 10, that the appellant City should not be compelled by mandamus or other legal procedure to fulfil before May 1, 1925, the obligations imposed upon it by the Act of annexation of 1910. All these Acts were Acts amending the statutory charter.

Meanwhile certain other amendments had been made of the charter with reference to works of paving in the City of Montreal. The first of these was in 1911, and was effected by s. 25 of Statutes of Quebec, 1 Geo. 5 (2nd sess.), c. 60, which so far as material was in the following terms: "The following article is inserted in the Act 62 Vict. c. 58, as art. 455: '455.—1. Notwithstanding any law to the contrary, when the city of Montreal shall decide and order the paving of any street, lane, highway, square or public place, wholly or partly, with permanent materials other than wood and macadam; the total cost of such paving shall be paid by the proprietors of immoveables bordering on such street, lane, highway, square or public place. 2. A roll shall be prepared for such purpose by the city surveyor, and the total cost of such paving shall be apportioned among such proprietors proportionately to the frontage of their properties as shown on the valuation roll, independently of the buildings thereon erected.' "

Again, in the Act of 1912 already referred to, it was provided by s. 29 as follows: "Article 455 of the Act 62 Vict. c. 58, as enacted by the Act 1 Geo. 5 (2nd sess.), c. 60, s. 25, is replaced by the following: '455.—1. Notwithstanding any law to the contrary, when the board of commissioners shall decide and order by resolution the paving of any street, lane, highway, square or public place, wholly or partly, with permanent materials declared to be such by the said board the total cost of such paving, including the intersection of lanes, shall be paid by the proprietors of immoveables situate on such streets, lanes, highways, squares or public place or part thereof, with the exception, however, of the paving of the intersections of streets which shall be paid by the city out of the loans fund.' "

Again, in 1914, by s. 26 of the Statutes of Quebec, 4 Geo. 5, c. 73, the following provision was enacted: "Article 455 of the Act 62 Vict. c. 58, as enacted by the Act 1 Geo. 5 (2nd sess.), c. 60, s. 25; and replaced by the Act 3 Geo. 5, c. 54, s. 29; is replaced by the following: '455. The city may, by a resolution of the board of commissioners approved by the majority of all members of the council, charge the proprietors the whole or a portion of the cost of permanent pavement, or of pavements which it declares to be permanent, which shall be laid or re-laid in future. To that end it may, by such resolution, impose a tax on each property in front of which such pavement shall be laid or re-laid, either at the rate of a uniform price per square yard of pavement contained in half the width of the street in front of such property, or at the rate of a fixed uniform sum per foot of frontage. Such tax shall be levied and apportioned by means of a roll made out in accordance with the procedure laid down in art. 460, and arts. 456, 457A and 460 shall apply to such rolls. Or it may, by a resolution passed in the same manner, annually impose a special tax on all immoveable properties situate in the city, based on the valuation of the said properties as shown on the valuation roll. Such tax shall be entered in the annual general roll of assessments on immoveable properties.' "

Acting under this last statute, the Council of the appellant City on July 20, 1925, resolved to adopt a report and recommendation: ". . . . qu'un pavage permanent soit construit sur la rue Sherbrooke, entre les rues Duquesne et Desautels, quartier Mercier, que le coût de ce pavage soit mis à la charge des propriétaires d'immeubles en face desquels il sera fait et que, à cette fin, il soit imposé, sur chaque immeuble en face duquel le dit pavage sera fait, une taxe spéciale foncière répartie au moyen d'un rôle préparé conformément à la loi, au taux fixe et uniforme de $22.57 le pied de front de chacun des dits immeubles, le tout conformément aux dispositions de la charte de la Cité."

J. C.
1932
MONTREAL CITY
v.
MONTREAL INDUSTRIAL LAND CO.

The work of paving under the resolution was begun on May 1, 1926, and finished on December 22, 1926. The paving so done was different from macadamizing: in fact, Sherbrooke Street was never macadamized. There was no evidence that if macadamizing had been done the cost of the paving actually executed (which appears to have been asphalt) would in any way have been reduced. On December 13, 1928, the respondents were assessed in the sum of $5888.04 in respect of the paving, being at the rate of $5 per square yard. This rate was an arbitrary rate and less than the actual cost, the assessment being made under an Act of 1928, amending the charter of the City of Montreal (Statutes of Quebec, 1928, c. 97), which by s. 15 provided that notwithstanding the earlier provisions relating to charging for paving: ". . . . the cost of pavings laid since the 1st January, 1919, and that of pavings to be laid hereafter on public places, streets or lanes, shall be charged to the bordering proprietors at the uniform price of five dollars per square yard, payable cash or in twenty annual instalments, according to the number of frontage feet of the immoveables belonging to them."

The assessment was objected to by the respondents, who on February 8, 1929, brought an action to have the assessment and ancillary proceedings set aside and declared void and illegal. The claim was dismissed by Désaulniers J., the trial judge, whose judgment was affirmed on appeal by the Court of King's Bench by a majority consisting of Dorion, Tellier, and Bernier JJ., Howard and Galipeault JJ. dissenting. From these decisions an appeal was taken to the Supreme Court of Canada, which, by a majority, allowed the appeal, reversed the judgments below, and set aside the assessment roll in question: Anglin C.J., Rinfret and Smith JJ. concurred in this decision, Lamont and Cannon JJ. dissenting. From the judgment, the present appeal is brought by special leave.

The appellants' case was primarily rested on the statute of 1928, quoted in part above, under which the assessment in question was made. That statute, it was argued, provided that the cost of pavings laid since January 1, 1919 . . . . on public places, streets or lanes should be charged on bordering proprietors at the uniform price of $5 per square yard. What pavings answered this description could be proved by evidence, so that the position was as if the list of actual pavings had been set out seriatim in the section: in that list Sherbrooke Street would have figured and the name of the respondents would have appeared as that of the bordering proprietors: hence the position was the same as if a specific and express enactment had expressly imposed the assessment on the respondents. No doubt the statutory provision is retrospective, but it has not been suggested that the validity of the provision is on that account impaired. Their Lordships think this case is well founded. Mr. Geoffrion for the respondents has argued that the section must be read as limited to pavings lawfully laid, and that the pavings in question were not lawfully laid and were therefore outside the section, so that the assessment on the respondents was bad. He has contended that the pavings were unlawfully laid, because the positive enactment in the statute of 1910 placed on the appellant City the obligation to macadamize the street in question, and hence by implication prohibited the appellant City from laying any different kind of paving and therefore from laying the paving actually laid, which was admitted to be different from macadam. He further contended that the later statutory provisions quoted above, which gave the appellant City the power of resolving to lay permanent paving and to charge the frontagers with the cost, did not repeal or derogate from the statute of 1910 and were irrelevant for the purposes of this case. Their Lordships do not accept these contentions.

It is no doubt true that the statute of 1910 imposed an obligation on the appellant City, which was recognized from time to time by the statutory provisions extending the time for performance: it may be that the obligation represented in fact a bargain between the appellant City and the town which was annexed for the benefit of the town's inhabitants: but, however that may be, the obligation was embodied simply in the statute of the Province, and the legislature which

J. C.
1932
MONTREAL CITY
v.
MONTREAL INDUSTRIAL LAND CO.

enacted that statute could repeal or modify it, even though to do so might appear inequitable. The question is whether the later legislation has repealed or modified the obligation.

The respondents relied on the principle that generalia specialibus non derogant: that is, in this case, to say that the statutes after 1910 were general, referring to all paving done in the whole area of the appellant City, and hence did not derogate from or affect the statutory provisions specially relevant to the specific streets dealt with in the statute of 1910. The rule was thus stated by Lord Hobhouse in giving the opinion of this Board in *Barker* v. *Edger* (1): "When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly." But Lord Hobhouse adds: "Each enactment must be construed in that respect according to its own subject-matter and its own terms." The principle has often been discussed in many reported cases, with results sometimes in one direction and sometimes in others.

In the present case, the various enactments are all amendments of the same statutory charter, and, as appears above, in certain cases the special enactment is recognized in the same statute as the general enactment. But their Lordships are of opinion that the fair construction on the whole is that the legislature intended to give the appellant City's Council a discretion to pass a resolution to effect permanent paving if in their view it was the proper course to take, instead of macadam, even in the case of streets falling within the statute of 1910, and to do so even though they had not actually macadamized the streets. If the obligation to macadamize had been fulfilled, it could not be contested that under the later enactment the appellant City Council had the right subsequently to remove the macadam and lay the permanent pavement and in doing so avail themselves of the power to charge the frontagers; and it seems that this right could not be denied merely because the macadam had not been laid at all, if the interests of highway efficiency in the opinion of the Council required the right to be exercised. It is not necessary here to consider whether or not any persons had any right of action because the macadam was not laid. In effect therefore the obligation to macadamize free of cost to the frontagers was qualified by the right of the appellant City Council to substitute other paving if in their opinion circumstances so required. In this way the various enactments can be read together. Hence, in their Lordships' judgment, the appellant City, in paving Sherbrooke Street as they did, were not doing any unlawful act.

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(1) [1898] A. C. 748, 754.

But, even if the paving were unlawful, their Lordships cannot hold that the Act of 1928 would not apply or that the words " pavings laid " could be limited to pavings lawfully laid. There is no saving clause. The words are simply words of positive fact, relating to matters capable of precise identification. If the respondents desired to have the limitation they now claim on these words they ought to have obtained the addition to the statute of apt words of qualification.

In the result their Lordships are of opinion that the appeal succeeds, that the judgment of the Court of King's Bench affirming the judgment of the trial judge upholding the assessment as valid should be restored and the respondents should pay the appellants' costs of the appeal and their costs in the Courts below. They will humbly so advise His Majesty.

Solicitors for appellants : *Lawrence Jones & Co.*
Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

N. L. COWPER . . . . APPELLANT;

AND

PAPER SACKS PROPRIETARY, LIMITED, AND ANOTHER . . . . RESPONDENTS.

J. C.*
1932
July 28.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Patent—Application to amend Specification—Subsequent Proceedings for Revocation—Modification of proposed Amendments—Jurisdiction—Patents Act, 1903–1921 (*No.* 21 *of* 1903; *Commonwealth*), *ss.* 71, 80, 81.

When an application has been made under s. 71 of the Patents Act, 1903–1921, of Australia, to amend a complete specification, and afterwards an action for infringement, or for revocation, is commenced, ss. 80 and 81 of the Act do not preclude the Court which has seisin of the application from permitting a modification of the amendments proposed and from sanctioning the modified amendments.

After the High Court of Australia had affirmed an order by which a patentee's application under s. 71 had been dismissed upon the ground that the amendments, contrary to s. 78, would make the invention substantially different from that originally claimed, proceedings were commenced for revocation of the patent. Upon appeal to the Privy Council the patentee was allowed to modify the amendments proposed, but the Board, not being satisfied that the amendments even as modified were permissible under s. 78 except as to certain uncontested items, affirmed the judgment of the High Court, subject to allowing the uncontested amendments.

APPEAL (No. 21 of 1931) by special leave from a judgment of the High Court of Australia (June 22, 1931) affirming an order of the Commissioner of Patents which dismissed an application by the appellant, under s. 71 of the (Commonwealth) Patents Act, 1903, to amend his complete specification.

After the judgment of the High Court had been delivered proceedings were commenced for revocation of the appellant's patent.

The present report relates only to the decision of the Judicial Committee with regard to the effect of ss. 80 and 81 of the Act upon the power of a Court having seisin of an

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, and LORD WRIGHT.

J. C.
1932
COWPER
v.
PAPER
SACKS
PROPRIETARY, LD.

application under s. 71 to allow the applicant to modify the proposed amendments of his specification, although an action for infringement or proceedings for revocation of the patent have been commenced. The sections are set out in the judgment of the Judicial Committee.

1932. June 14, 16, 17, 20, 21, 30. *James Whitehead K.C.*, *Maughan K.C.* and *Basil Drewe* for the appellant.

Trevor Watson K.C., *Tookey* and *Fullager* for the respondents.

July 28. The judgment (1) of their Lordships was delivered by

LORD TOMLIN. The appellant is the registered legal owner of letters patent No. 21809/25 of the Commonwealth of Australia. His appeal is by special leave against a judgment of the High Court of Australia which affirmed a decision of the Commissioner of Patents dismissing an application of the appellant for leave to amend the specification and drawings of his letters patent.

The patent law of the Commonwealth is regulated by the Patents Act, 1903–1921.

By s. 71 of the Act an applicant or a patentee may by request in writing left at the Patent Office seek leave to amend his complete specification by way of disclaimer, correction or explanation stating the nature of the amendment and the reasons for it. The next succeeding sections up to and including s. 79 regulate the proceedings following upon an application under s. 71, and in particular s. 78 of the Act provides that no amendment shall be allowed that would make the specification as amended claim an invention substantially larger than or substantially different from the invention claimed by the specification before amendment.

The original specification of the patent in question was headed "Improvements in Paper Bags."

[The judgment, after having set out the description of the invention contained in the specification, and stated the further contents of the specification and the material claims, continued :—]

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(1) The judgment is here reported only so far as it relates to the effect of ss. 80 and 81 of the Patents Act, 1903–1921, of Australia.

The application for the patent in question was dated February 17, 1925, and acceptance was on July 13, 1925.

On November 7, 1929, the appellant, being then registered owner of the patent, applied to amend the specification and drawings, his reason for making the amendment being stated in the following words : " To disclaim certain parts of the invention claimed, to disclaim an alternative form of the invention as illustrated in figure 8 of the drawings and described in the letterpress relating to the said figure 8, to better explain certain particulars of the invention, to delete certain claims, to omit the said figure 8 of the drawings and the said letterpress relating to the said figure 8 and to make consequential variations in the text to the specification."

The amendments applied for were very extensive. Substantial portions of the body of the specification were practically re-written, the whole of the twenty-eight claims were struck out and figure 8 of the drawings and the relevant part of the text of the specification relating thereto were eliminated. Twelve claims were substituted for the original twenty-eight claims.

The Commissioner of Patents refused the application on the ground that the amendments practically amounted to the re-writing of the whole of the specification and the formation of a new claim.

An appeal to the High Court failed upon the ground that the amendments would have made the specification as amended claim an invention substantially different from the invention claimed by the specification before amendment.

At the date when the application for amendment was launched there was no action for infringement or proceeding for revocation pending, but after the decision of the High Court the respondents, Paper Sacks Proprietary, Ld., instituted proceedings for the revocation of the letters patent. Such proceedings were stayed pending the determination of the appellant's present appeal against the decision of the High Court.

After the matter had been opened before their Lordships' Board the appellant's counsel, under pressure of the criticisms levelled against his amendments, asked leave to substitute some new amendments in place of his original amendments.

The application was opposed by the respondents, who urged that having regard to ss. 80 and 81 there was no jurisdiction in their Lordships' Board to grant the application, and such leave could only be given by the judge having seisin of the revocation proceedings.

The two sections in question are in the following terms: "80. Except as provided in the next following section the provisions of ss. 71 to 79 do not apply when and so long as any action for infringement or proceeding for revocation of a patent is pending. 81. In an action for infringement of a patent and in a proceeding for a revocation of a patent the Court, Justice, or Judge may at any time order that the patentee shall subject to such terms as to costs or otherwise as the Court, Justice, or Judge may impose be at liberty to apply under the last preceding section for leave to amend his specification by way of disclaimer and may direct that in the meantime the trial or hearing of the action be postponed."

Now it was not disputed that upon an application properly instituted under s. 71 any Court having seisin of the matter would be free, if no such proceedings as are mentioned in s. 81 had in the meantime been begun and remained pending, to give leave to the applicant to modify his amendments and if thought proper to sanction the modified amendments, but it was urged that this power ceased the moment any proceeding of the kind mentioned in s. 81 was launched.

Their Lordships were unable to accept the view urged by the respondents upon the effect of ss. 80 and 81. In their Lordships' judgment it is not the result of these sections that any limitation is imposed upon the jurisdiction of a Court having seisin of an application properly launched under s. 71 because at some date subsequent to the application under s. 71 an action for infringement or a proceeding for revocation has been instituted.

Taking this view of the matter their Lordships authorized the appellant to bring in new amendments upon the footing that success on the new amendments would not improve his position in the matter of costs. In these circumstances it was unnecessary for their Lordships to express any opinion upon the original amendments, and the new amendments became the sole matter for consideration.

By the new amendments all the original amendments to the body of the specification with certain exceptions are swept away.

[The six retained claims, as amended, were set out. With regard to two items it was pointed out that there was no objection; the first was merely "disclaimer," and the second merely "correction." The real contest was as to claim 1; if that claim could not be supported the others failed. The judgment proceeded:—]

Having regard to the pending proceedings for revocation their Lordships desire to refrain from expressing on this appeal any view in relation to the original specification which might seem to affect in one direction or the other the question to be resolved in those proceedings.

Now an applicant for amendment has upon him the burden of showing that his amendment falls within one or other of the three categories of disclaimer, correction, or explanation, and that he is not claiming an invention which is substantially larger than or different from that originally claimed. This necessarily involves that his amendment must be unambiguous, otherwise the onus upon him cannot be discharged.

It has been said that the number of combinations possible under the claims of the original specification is so great that the selection of one of them is an operation of such complication and difficulty as in itself to amount to new invention, or at any rate to something more than disclaimer of all the combinations other than the one selected.

Their Lordships do not think it necessary to express any view upon the question of invention by selection or upon the question whether the number of combinations possible under

J. C.
1932
COWPER
v.
PAPER
SACKS
PROPRIETARY, LD.

the original specification can make any difference in principle to the power of disclaimer.

It is enough for the purpose of the present appeal to say that in their Lordships' judgment the language of claim 1 of the new amendments is of import too doubtful to enable the appellant to discharge the onus that is upon him. He fails in their Lordships' opinion to establish with sufficient certainty either that this claim is merely one of those already covered by some one or more of the old claims upon which he relies or that it does not comprise an invention substantially larger than or substantially different from that covered by the unamended specification.

[The grounds upon which their Lordships had come to the above conclusion were set out, and the judgment concluded as follows :—]

In their Lordships' judgment, therefore, the appeal in regard to its real substance fails, but the amendments upon the two minor matters already indicated may properly be allowed and to this extent the order of the High Court should be varied. Leave, therefore, should be given to amend the specification in the following respects only (which were set out).

Their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant : *Linklaters & Paines.*
Solicitors for respondents : *Merrimans.*

[PRIVY COUNCIL.]

TSANG CHUEN . . . . APPELLANT; J. C.*

AND 1932

LI PO KWAI . . . . RESPONDENT. July 19.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong—Registration of Deed—Statutory Memorial—Receipt Clause—Alleged Trust—Admissibility of Evidence—Estoppel—Negligence—Non-production of Deed—Land Registration Ordinance, 1844 (*No.* 1 *of* 1844; *Hong Kong*), *ss.* 4, 7.

By a deed of 1917 the respondent assigned leasehold premises in Hong Kong to A. and B. as joint tenants, the deed stating that the property had been sold to them for $16,000, the receipt of which was acknowledged. The deed was registered under the (Hong Kong) Land Registration Ordinance, 1844, with a memorial which, as required by the Ordinance, was verified on oath and gave full particulars of the deed, including the receipt. In 1929 B. mortgaged a half interest in the property to the appellant as security for an advance of $25,000; the mortgage was registered under the Ordinance. Before the advance was made the appellant's solicitor inspected the registered memorial of the deed of 1917, but he did not demand production of the original. B., unknown to the appellant or his solicitor, was a son of the respondent. The respondent brought an action claiming to be entitled to the property freed from the mortgage. By his evidence, which the Courts in Hong Kong accepted as reliable after an objection to its admissibility, the respondent stated that the name A. was an alias for himself, that there was no consideration for the deed of 1917, and that it had remained in his possession, no beneficial interest being intended to be conveyed to his son B.

Held, that the action failed, both because the respondent's evidence was inadmissible to contradict the plain terms of the deed, and because the registered memorial estopped the respondent from alleging a trust; having regard to the full particulars contained in the statutory memorial there was no negligence in not having required production of the deed itself.

Rimmer v. *Webster* [1902] 2 Ch. 163, 173 applied.

Kettlewell v. *Watson* (1884) 26 Ch. D. 501 and *Oliver* v. *Hinton* [1899] 2 Ch. 264 distinguished.

Judgment of the Supreme Court of Hong Kong reversed.

APPEAL (No. 93 of 1931) from a judgment of the Supreme Court of Hong Kong (August 28, 1930) affirming a judgment of that Court in its original jurisdiction (April 8, 1930).

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* *Present:* LORD BLANESBURGH, LORD TOMLIN, and SIR LANCELOT SANDERSON.

The respondent sued in the Supreme Court of Hong Kong for a declaration that he was entitled to certain leasehold property in Hong Kong free from a mortgage to the appellant on one undivided moiety of the property, and claimed a reassignment to him of the undivided moiety.

The trial judge (Gollan C.J.) granted the relief prayed, and his judgment was affirmed on appeal by Grain P., Kemp C.J., and Wood J.

The facts and the grounds of the judgments in Hong Kong appear from the judgment of the Judicial Committee.

1932. March 8, 10. *Gover K.C.*, *Wilfrid Hunt* and *Nyholm-Shawcross* for the appellant.

Spens K.C. and *Andrewes-Uthwatt* for the respondent.

July 19. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The question at issue on this appeal is whether the respondent has shown a title in himself to the entirety of certain leasehold properties in Hong Kong, freed and discharged from a legal mortgage upon an undivided moiety thereof held by the appellant from Li Nga Ching, the second son of the respondent. In the Courts of Hong Kong, the respondent has established his claim. The appellant's title as mortgagee has, following deliverances of great elaboration, been set aside, and he has been ordered to reassign to the respondent freed from his mortgage the undivided moiety in question. The order to that effect made on April 8, 1930, by the Supreme Court of Hong Kong in its original jurisdiction was, on appeal, affirmed in the full Court by its judgment of August 28, 1930. This is the mortgagee's appeal therefrom.

The respondent is a Chinaman of position resident in Hong Kong. His dispute with the appellant concerns an undivided moiety of one of three separate parcels of leasehold properties, held under Crown leases for long terms, of which in 1912 the respondent became possessed on the division of his deceased father's estate. For present purposes it will suffice compendiously to describe the properties as Nos. 18 and 20 Wing

Kut Street, Victoria, Hong Kong, and it will be convenient hereafter to refer to them as the properties in question.

By the deed of March 9, 1917, these properties were assigned by the respondent to one Li Kan and to Li Nga Ching already mentioned as joint tenants for the residues of the terms granted by the Crown leases under which they are held at the apportioned rents adjusted with the Crown. The deed, upon the terms of which much in this case will be found to depend, is one of purchase and sale. The respondent party to it of the one part, and as such described throughout as "the vendor," is named as "Li Hung Cheung alias Li Po Kwai of Victoria in the Colony of Hong Kong, gentleman." The parties to it of the other part, and as such described throughout as "the purchasers," are named and described as "Li Kan and Li Nga Ching, both of Victoria aforesaid, gentlemen." The deed contains a recital that "the vendor" has agreed with "the purchasers" for the sale to them of the properties in question at the price of $16,000. The assignment is expressed to be made in pursuance of that agreement and in consideration of $16,000 to the vendor then paid by the purchasers. The receipt of the $16,000 is acknowledged by the respondent as vendor in the body of the deed. It is made also the subject of a separate indorsement signed by the respondent in his vendor name and witnessed by his solicitor. The assignment of the properties in terms extends to all the estate, right, title, interest, property, claim and demand whatsoever of the vendor in or to the same, and the deed contains the usual full covenants for title given on a sale by a vendor to purchasers, as also a covenant by the purchasers with the vendor to pay the apportioned rents and perform the covenants in the leases under which the properties in question are held so far as relating to these properties, with a further covenant by them to indemnify the vendor against such rents and covenants.

The respondent in executing the deed signs his vendor name in Chinese characters; the execution signature of "Li Kan" is in English characters. The attesting witness to both executions is the respondent's solicitor.

Li Nga Ching was, as has already been stated, a son of the respondent, but there is nothing either in the deed or anywhere else to suggest the existence of that or of any other relationship between them; nor is there any hint of the fact, for the first time set up in this litigation, that Li Kan, the other "purchaser" is the same person as the vendor. On the contrary the deed is so framed as to represent that the vendor is a separate person from either of the purchasers: that the transaction is an out-and-out sale, and that the vendor, as a result of it, has parted with all estate and interest of every kind in the properties assigned. In entire accordance with its expressed effect the deed was stamped $80, the ad valorem stamp on the stated purchase price.

On October 11, 1927, a lease of 20 Wing Kut Street, parcel of the properties in question, was granted by "the purchasers" to a tenant for a term of five Chinese years from September 26, 1927, subject to the rent therein mentioned. The lease is expressed to be executed by Li Kan in Chinese characters and by Li Nga Ching in English characters. The deed of assignment had not been executed by Li Nga Ching. The execution by him of this sub-lease manifests to anyone perusing the two deeds his acceptance of the deed of assignment from which was derived his only sub-lessor's interest in the properties in question. The respondent now states, it will be seen, that it was he who executed the lease in Li Nga Ching's name and on his behalf.

As already indicated, there has been in force in Hong Kong since 1844 a system of registration of deeds under the Land Registration Ordinance, 1844, and memorials, both of the deed of assignment and of the lease just referred to, were duly registered by the respondent in the register at the Land Office. It will be convenient before considering in detail the terms of these memorials—and more particularly those of the memorial of the assignment—to refer to some of the immediately relevant provisions of the ordinance under which both were registered.

First of all its preamble, in striking contrast with that of the Yorkshire Registry Act of 6 Anne, c. 20, from which

J. C.
1932
TSANG CHUEN v. LI PO KWAI.

many of the procedure and other clauses of it have clearly been taken, is in its concluding terms very significant: "Whereas it is expedient to prevent secret and fraudulent conveyances and to provide means whereby the title to real and immoveable property may be easily traced and ascertained." Sect. 2 declares that the Land Office shall be a public office for the registration of deeds, conveyances and other instruments in writing, and wills and judgments, and provides for the entry and registration in that office of any of these documents by which any parcels of ground, tenements or premises in the colony may be affected. Sect. 3, sub-s. 2, provides that any such instruments which are not registered shall (as against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same premises), with a proviso not presently material, be null and void to all intents and purposes. Sect. 4 has no counterpart in the Yorkshire Act of Anne, and is very material: "No notice whatever, either actual or constructive, of any prior unregistered deed, conveyance or other instrument in writing or will or judgment shall affect the priority of any such instrument as aforesaid as is duly registered."

The particulars required to be stated in every memorial are set forth in the First Schedule to the Ordinance, and in striking contrast to what Lindley L.J., in *Kettlewell* v. *Watson* (1), described as the "very little information given" by the memorials required by the Yorkshire Act, are so complete as to be really exhaustive. They are in these terms: "(1.) Date of instrument or will. (2.) Nature and object thereof. (3.) Names and additions of the parties or of the devisors or devisees. (4.) Names and additions of the witnesses thereto. (5.) Description of the land or premises conveyed in or affected by the instrument or will. (6.) Name and description of the place where situate. (7.) Consideration and to whom and how paid. (8.) Any other particulars which the case may require." Sect. 7 requires that every memorial shall be verified by the oath of some competent person that the same contains a just and true account of the several particulars therein set forth, which oath shall be taken before a Justice of the Peace.

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(1) 26 Ch. D. 501, 508.

The memorial of the deed of assignment was registered by the respondent on March 14, 1917. As required by the Ordinance, the memorial is in effect a complete statement of the deed of assignment. That deed is therein described as being one made between " Li Hung Cheung alias Li Po Kwai (who and whose executors and administrators were thereinafter called the vendor of the one part) and Li Kan and Li Nga Ching (who and the survivor of them and the executors and administrators of such survivor their or his assigns were therein called the purchasers) of the other part." The assignment is stated to have been made in consideration of $16,000 " to the vendor then paid by the purchasers." The premises in question described in the identical terms of the assignment with " all the estate right title interest property claim and demand whatsoever of the vendor therein or thereto," are expressed to have been assigned by the vendor to the purchasers as joint tenants for the residue of the terms of years stated in detail and subject to the apportioned rents specified and to the covenants in the Crown leases affecting the properties in question. It may be said as definitely of the memorial as it has already been said of the deed itself, that there is nothing in its terms to suggest even remotely the existence of any relationship between the respondent and Li Nga Ching, nor is there any hint that the respondent, the "vendor," is the same person as Li Kan, the other of " the purchasers."

Two further facts of real significance in relation to the memorial, and very relevant in the present dispute, are that its correctness is verified by the oath of the clerk to the respondent's solicitors and that it is actually signed by the respondent himself in his " vendor " name.

The memorial of the lease of October 11, 1927, also registered at the Land Office, took the form of a full copy of the original. It was registered on October 16, 1927, and was, like the other memorial, verified by the oath of the clerk of the respondent's solicitors.

Some facts relating to the dealings by the respondent with the two other long leaseholds to which he became entitled in the division of his father's estate may, at this point, be collected. The respondent has four sons. In 1917 his three younger sons, the first of whom was Li Nga Ching, were aged, respectively, 21, 19 and 14 (Chinese reckoning). Evidence was given to show that on the same March 9, 1917, on which the respondent executed the assignment already stated, he executed another relating to the second of the leasehold properties to the same " Li Kan " and his third son as joint tenants, and an assignment of the third leasehold property to " Li Kan " and his fourth son as joint tenants. The form of each of these assignments was the same as that of the assignment of the properties in question, but with different sums expressed as the purchase consideration.

These two assignments are relied upon by the respondent as confirmatory of the case he makes with reference to the deed now in question. But it is not suggested that the existence of these deeds or of either of them was known to the appellant or his solicitors prior to the institution of these proceedings. It would appear, indeed, that had these deeds been known to the appellant before he took his mortgage, they would have tended to confirm rather than otherwise the complete regularity of the assignment now in question. For it was stated on behalf of the respondent in the trial Court, as a reason for the non-production of the first of the two deeds, that the properties comprised therein had since been sold, presumably under the title thereby conferred.

The association of the appellant with the properties in question came about in the following way. He is a banker, a partner in, and, in the transaction of mortgage now to be stated, the nominee of the Han Chuen Bank of Victoria, Hong Kong. In March, 1929, he was approached in the ordinary course of business by a mortgage broker with a proposal that he should lend $25,000 for six months to Li Nga Ching on the security of his half-interest in the properties in question. Li Nga Ching may now be conveniently referred to as the mortgagor. The appellant did not know him, nor had he previously heard of the respondent. He himself inspected the properties; was satisfied with the sufficiency of the security offered; was prepared favourably to consider the loan proposal, and he instructed his solicitor to proceed, leaving it to him to make all inquiries.

It is matter of admission that, prior to the mortgage which followed, the appellant's solicitor searched the register at the Land Office in reference to the properties in question and that he inspected the registered memorial of the assignment, and that he proceeded with the preparation of the mortgage deed and the completion of the transaction of loan as a result of that inspection. He did not see the assignment itself. That he asked for it and was informed that it was in the possession of Li Kan, joint tenant with the mortgagor, is not improbable in view of his letter, later to be mentioned, asking Li Kan for a loan of the deeds in order to make copies of them to keep with the mortgage deed. But it is not proved that any such inquiry was made. The solicitor did not give evidence. The fact that he did not do so was a source of real embarrassment to the learned counsel for the appellant in their argument before the Board. In the view which their Lordships take of the case his non-appearance as a witness is less serious than it might well have been, and it may have seemed to him that his activities being to a large extent matters of admission the desirability of a full account from him of what he did was unimportant. It is right to add that no suggestion is made that either the appellant or he had actual notice or any suspicion, when the mortgage was accepted and the advance made, of any defect in the mortgagor's title to an undivided moiety of the properties in question.

The advance of $25,000 was made by the appellant to the mortgagor on March 7, 1929. By the mortgage deed of that date, after a recital that the properties in question were vested in Li Kan and the mortgagor for the residues of the terms of years under the said Crown leases, the mortgagor in consideration of the loan assigned the undivided moiety of the property in question to the appellant for the unexpired residues of the terms of years subject to the usual proviso for redemption. A memorial of the mortgage deed was, on its execution, duly registered pursuant to the Ordinance.

At the date of its registration there was no entry in the register of any estate or interest in the properties in question being possessed or retained by the respondent; no memorial, indeed, of any subsisting interest therein other than that of "the purchasers" under the deed of assignment and of their tenant under the registered lease.

It appears, however, that shortly before this date information had reached the respondent that his sons, or one of them, were attempting to deal with properties standing in their names. The respondent's reaction was to insert in a newspaper what one of the learned judges describes as a perfectly futile advertisement; he made no warning entry on the register.

On March 11, 1929, four days after the advance was made, the appellant's solicitors, in a letter addressed to "Mr. Li Kan" at the address of the respondent, gave him notice of the mortgage by the mortgagor. The letter proceeded: "As our client is informed the title deeds are in your possession we are instructed to request you to lend us the title deeds to enable us to make attested copies thereof to accompany the mortgage to our client. We shall be glad if you will lend us the title deeds upon the usual understanding." The reply of the respondent's solicitor of March 14 is, it must be agreed, a somewhat inapt description of his case as finally made in Court: "We are instructed by our client, Mr. Li Po Kwai, who in the names of Li Kan and Pi Lo respectively is the co-owner of the above properties to reply to your letter of the 11th inst. Mr. Li Nga Ching, the mortgagor, had no beneficial interest in any of these properties the funds for which were provided by our client and he had no right to mortgage them."

Fourteen days later, on March 28, 1929, the respondent commenced the action out of which this appeal emerges. The defendants were the appellant and the mortgagor. The mortgagor did not appear: indeed, he was never served with the writ. His whereabouts were said to be unknown to the respondent.

The respondent gave evidence at the trial. He gave the account already set forth of his connection with the properties in question and with his other inherited leasehold properties. He proceeded to say that "Li Kan," the joint purchaser, was himself. The name was his milk name—a name given to him when a baby by his mother. Other persons knew it. "Li Po Kwai" was an alias and he was mostly known to the public by it. He admitted that, except in the three assignments to which reference has been made, he had never taken any transfer of property in the name of "Li Kan." His only object in putting the leasehold properties into the joint names of himself and his three younger sons respectively was, he asserted, to mark them out so that in case of his death the properties might be handed to his sons later on. In cross-examination he said, with reference to the properties in question: "The sum of $16,000 was mentioned as the purchase price. I gave instructions that the sum should appear as purchase price. When making deed I knew I would have to pay solicitors' costs and stamp duty. I intended to mark out the property so that it might go to my son at my death if he behaved properly. But not automatically. If he did not behave properly I thought I had a right to cancel the assignment. If he behaved properly I would not have allowed the assignment to operate. I would have left my property by will."

The respondent went on to say that it was a Chinese custom to mark out property in this way; that, in fact, no money had passed and that he retained the assignments and earlier deeds in his possession and collected the rents and paid the outgoings. The mortgagor's signature to the lease of October 11, 1927, was attached by himself, he said. He had authority so to sign as the mortgagor was his son. He denied that the assignments were executed to escape or save death duty. None of his sons knew of them at the time they were made. The respondent did not explain how or when the mortgagor heard of the assignment in his favour, nor did he suggest that he had ever told the mortgagor that the assignment was not intended to confer any beneficial interest on him or that he was to hold any estate of his thereunder in trust for himself. Indeed, no evidence of any kind was adduced by the respondent to show that the mortgagor was ever aware that any trust was intended by himself, much less that one had ever been assumed by the mortgagor. Nor was any explanation offered why, if the assignment in question was to have no other function than that averred by the respondent, it was appropriate that it should have been registered at all, to say nothing of the circumstance with which registration was in fact made.

Kemp C.J. observes in his judgment on appeal: "When Li Nga Ching discovered the fact of the assignment he may have believed that his father had intended to transfer a beneficial interest to him, as he may well, and not unreasonably, have thought that his father's object as suggested on behalf of the [appellant] was either to avoid the payment of estate duty or to obviate the necessity of legal representation." Their Lordships agree. But, as will be seen later, they do not so readily accept the learned Chief Justice's observation which immediately follows: "This point, however, appears to be irrelevant for the purposes of this judgment."

The evidence of the respondent to the effect just stated was given subject to objection taken to its admissibility. It was also contended on the appellant's behalf that it was in essentials entirely unreliable. In this regard the evidence was, in the result, although with some hesitation, believed by the learned trial judge. He accepted, but not without some reserve, the respondent's assertion that the transaction had not been put through by him to escape death duty or for some other ulterior purpose. The complete futility of registration, from the respondent's alleged point of view, does not seem to have struck the learned judge. Upon the point of its admissibility he held the evidence to be receivable in order to rebut the presumption of advancement and to show that there was a resulting trust of the properties in question in favour of the respondent. There was in his view no estoppel, while the omission of the appellant to demand production of the deed of assignment from the mortgagor before making the advance to him constituted such gross negligence on his part as to deprive him as against the respondent of the protection of his legal estate. Accordingly, to adopt the language of another jurisdiction, he decreed the respondent's suit.

On appeal by the appellant to the full Court the trial judgment was affirmed. The learned judges there, as the learned trial judge had done, accepted the respondent's evidence as reliable, but, it would seem, mainly if not exclusively, because of their reluctance to interfere, on a pure question of fact, with the finding of a trial judge who had seen and heard the witness concerned.

They agreed with the learned trial judge's view that the reception of the evidence was permissible to rebut the presumption of advancement, while its effect was to disclose the existence of a resulting trust for the respondent. True it might be that neither the appellant nor his solicitor had either notice or suspicion of the existence of such a trust, but their ignorance was the result of gross negligence on the part of the solicitor in not insisting upon the production of the deed of assignment before any advance to the mortgagor was made. The fact that the respondent had always retained that deed in his possession entitled him, as they thought, notwithstanding his registration of the memorial, to assume that no dealings with any property comprised in it would take place without reference to himself. *Kettlewell* v. *Watson* (1) showed that even a system of registration did not dispense an intending purchaser or mortgagee from the duty of inquiring for or examining deeds, memorials of which were registered. Had the application of March 11, 1929, for inspection of the deed been addressed to the respondent when the loan was only in prospect, and not after it had been made, the appellant would have ascertained that the mortgagor had no interest in the properties in question and was not in a position to offer any security whatever over them. *Oliver* v. *Hinton* (1) was the authority in point. The appellant had been guilty of negligence in the transaction so gross that it would be unjust to deprive the respondent's resulting trust of its priority over his subsequently registered mortgage.

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(1) 26 Ch. D. 501, 508.

The above is a compendious summary of the ruling considerations which led the learned judges in the Courts below to their conclusions in favour of the respondent. Their Lordships must say at once that they are not prepared to accept the correctness of these conclusions nor the soundness of the elaborate reasoning on which they depend. If regard be had, as it must be, to the admitted or accepted facts of the case and to the well recognized principles of law and equity applicable thereto, the respondent's action must, their Lordships think, necessarily fail. It was because so much depended thereon that they have been at pains in the earlier part of this judgment to examine these facts in their appropriate setting. That examination has satisfied them that the conclusions of the learned judges can only be reached by ignoring essential principle and by refusing to attribute their proper consequences to the conduct and actions of the respondent, even as avowed in his own evidence which, with a reluctance no less than that of any learned judge below, their Lordships also accept at its face value.

The outstanding fact disclosed by the examination is that the evidence of the respondent, admitted by both Courts, and essential to support the judgment in each, was evidence which directly contradicted the terms of his own deed. It ought not to have been received at all.

Tindal C.J.'s statement of the law on this subject in *Shore* v. *Wilson* (2) has never been departed from. It may be useful to recall his words: "The general rule," he says, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

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(1) [1899] 2 Ch. 264.

(2) (1842) 9 Cl. & F. 355, 565.

These observations apply with peculiar force here. Perhaps the evidence of the respondent tendered and accepted may euphemistically be termed evidence to rebut the presumption of advancement and incidentally establish a resulting trust, but it was in fact tendered to show that the deed of assignment, followed by its attested registration, was an elaborate make-believe with, so far as the operative provisions of the deed were concerned, no word of truth in it from beginning to end. There were no "purchasers"; there had been no sale to any one; no purchase money had either been paid or received; it was a mere assignment by the respondent to himself. It is unnecessary, however, to dwell on more than one of these contradictions—that which sought to deny the payment and receipt of purchase price acknowledged in the deed by the respondent and attested by his solicitor.

As Sir George Farwell says in *Rimmer* v. *Webster* (1): "If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not in fact received such purchase money." It is not, Sir George Farwell goes on to say, as if the purchase money had been paid out of money found by the vendor himself or by some third person, and that fact was being deposed to. The distinction between the two cases is obvious : " There is no contradiction of the deed in saying 'True, the purchase money was paid by him, but out of some third person's money' ; there is a direct contradiction in saying that it was never paid at all."

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(1) [1902] 2 Ch. 163, 173.

Evidence to that effect accordingly, under Tindal C.J.'s rule, was here inadmissible " to establish either a lien for unpaid purchase money or that there was a resulting trust for the " vendor. Indeed, it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed ; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out-and-out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form, not exhaustively accurate but without an actual misstatement of fact. Instances of each of these will be found in *Haigh* v. *Kaye* (1) ; *In re Duke of Marlborough* (2) ; *Barton* v. *Bank of New South Wales* (3) ; *Carritt* v. *Real and Personal Advance Co.* (4)

But the present position is that correctly described by Farwell J., in the recent case of *In re King's Settlement* (5), where he says : " If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction, but that the grantees take on a secret trust not disclosed in the conveyance." And this statement brings into clear relief the respondent's position in these proceedings. If he fails to establish a resulting trust which requires no writing to support it, his claim must fail. He cannot set up an effective express trust against the appellant, for at least four reasons. First, no agreement by the mortgagor to be a trustee for him has been established, and the respondent's own evidence negatives the possibility of the existence of such an agreement. Secondly, to be valid, that agreement must have been in writing. Thirdly, if it were in writing it would, even if known to the appellant, have been of no avail against his registered mortgage unless it had been first registered: see Ordinance, s. 4. Fourthly, such a trust has never been registered. The truth, indeed, is that after the execution of his deed of assignment, the respondent's claim had to be rested on an express declaration of trust by the mortgagor. But such a trust unregistered would have been useless to him as against the appellant. His essential task, accordingly, was to establish a resulting trust, which, in the circumstances, alone could help him. This he has sought to do by evidence inadmissible for its purpose. On this ground alone, therefore, as it seems to their Lordships, the respondent's case must fail. He proves no resulting trust whatever.

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(1) (1872) L. R. 7 Ch. 469.
(2) [1894] 2 Ch. 133.
(3) (1890) 15 App. Cas. 379.
(4) (1889) 42 Ch. D. 263.
(5) [1931] 2 Ch. 294, 299.

But not only on this ground does his case disappear. It fails also because of estoppel. To their Lordships it seems clear that by his registration of the memorial of his deed of assignment the respondent is estopped as against the appellant, who took his registered mortgage in reliance on that memorial, from denying its correctness in any essential particular. The memorial is a complete statement of the deed of assignment, including therein a statement as to receipt of the purchase price. Its correctness, as required by the Ordinance, is duly attested. Its registration is, in terms of the Ordinance, a means whereby the title to this immovable property may be easily traced and ascertained. The respondent has been acquitted of any fraudulent intent or ulterior purpose in registering it, but his avowed purpose in executing the deed would have been fully attained without any registration at all, and the respondent by the registration of the memorials both of the deed and the lease must be taken,

J. C.
1932
Tsang Chuen v. Li Po Kwai.

in the absence of any other explanation, to have intended "to produce faith" by such registrations—to adopt a phrase of Fry L.J. in *Bickerton* v. *Walker*. (1) It is not to be disputed—*Rimmer* v. *Webster* (2) would be authority for the proposition if it were—that if the actual deed of assignment had been produced by the mortgagor to the appellant before his mortgage, the respondent would have been estopped from disputing its correctness and the appellant have been relieved of any imputation of negligence had he refrained from inquiry of the respondent as to any rights or claims of his: see *Bickerton* v. *Walker*. (3) Their Lordships can see no reason why the respondent should not have put the appellant in precisely the same position towards himself, so soon as it is proved or admitted that on the faith of the memorials the appellant advanced his money to the mortgagor.

Their Lordships have some difficulty in appreciating the real grievance of the decision in *Kettlewell* v. *Watson* (4) on this point. That was a Yorkshire Registry case, under the statute of Anne and before "the law on the subject of registration as regards land in Yorkshire was revolutionised by the Yorkshire Registries Acts, 1884 and 1885": see Dart, Vendors and Purchasers, 7th ed., vol. 1, p. 607. Lindley L.J. there said (5) that the registered memorials under the earlier Act gave very little information. He added that the object of the statute of Anne seemed rather to be to let people know what they were to inquire about than to dispense with inquiry respecting deeds and documents, memorials of which are registered—a passage from his judgment already referred to. All of which is, of course, true with reference to that statute. But the statute contained no preamble corresponding to that in the Hong Kong Ordinance; it required no memorial in any sense complete. There was, for instance, no obligation to disclose the purchase consideration, and in the memorial in question in *Kettlewell* v. *Watson* (6) there was no such disclosure, nor did the subsequent purchasers or mortgagees there ever inspect the register. The memorial accordingly in that case could have worked no estoppel. But Fry J. in the course of his judgment (1) indicates how much the facts of the present case would have influenced him: "The registration of the deed is not notice to all the world of the receipt of the purchase money, because the memorandum registered does not state the receipt for the purchase money, and therefore it appears to me that it cannot interfere with the right of the vendors to the lien which was created by the mere fact of the non-payment of the money." The learned judge indicates in that passage not obscurely what his view would have been had he been dealing with a memorial like that in the present case and, in fact, relied upon by the subsequent mortgagee.

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(1) (1885) 31 Ch. D. 151, 159.

(2) [1902] 2 Ch. 163.

(3) 31 Ch. D. 151, 158.

(4) (1882) 21 Ch. D. 685; (1884) 26 Ch. D. 501.

(5) 26 Ch. D. 501, 508.

(6) 21 Ch. D. 685, 699.

On this ground also, in their Lordships' judgment, the respondent's case fails.

But, lastly, it fails on a comparison of the conduct of the respondent and the appellant in this matter, the ground selected by the Courts below for their decision in favour of the respondent. How, first of all, may the respondent's conduct in relation to the transaction be described? He placed upon the register an assignment which he now asserts was no assignment at all. He thereby made a representation which induced the appellant to advance money to his son; he misinformed as to his position all persons searching his title in a public record; and when he heard of attempts by his son to raise money he published a futile advertisement and entered no warning notice on the register. In the face of that catalogue their Lordships have difficulty in following Kemp C.J. when in his judgment he says that of "the respondent it cannot be said that he did anything which he was under a duty not to do, or that he omitted anything which he was under any duty to do."

And where was the "gross negligence" of the appellant's solicitor? It consisted, so it is said, in not demanding from the mortgagor production of the deed of assignment, a deed quite naturally in the possession of his co-tenant. Now, that the solicitor by refraining from demanding production of the deed exposed his client, the appellant, to the grave risk of being postponed to some mortgage by deposit made by "the purchasers" after the date of the assignment to them, is not, after the decision in *Oliver* v. *Hinton* (1), to be gainsaid. But that is not the equity which is now being set up by the respondent against the appellant. That was an equity of which the custody of the deeds was a concomitant. The equity here sought to be set up by the respondent is one in no way dependent upon the whereabouts of the deeds: it is an equity upon the existence of which the production of the deed of assignment would cast no light at all. For the protection of the appellant against such a concealed equity as this production of the deed, when a memorial of it had been already considered, would have been of no assistance. The appropriate question for the appellant's solicitor to have asked would have been, not where is the deed of assignment, but whether the respondent had thereby reserved to himself any interest in the properties in question? And why should the solicitor have troubled himself to ask any such question, when the possibility of the existence of any such interest was negatived by the terms of the registered memorial of the deed vouched by the respondent himself?

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(1) 21 Ch. D. 703.

The inquiry, as it seems to their Lordships, would have been impertinent, and the solicitor cannot be said to have been guilty of any negligence for not having made it. The respondent, having put his hand to and registered his deed of assignment, was not entitled to suppose that any inquiry with regard to that or any other reserved equity would ever be addressed to him. And the appellant with no notice of that equity has now had assigned to himself for value the legal estate. Between the respondent and the appellant in this matter, so far as the conduct of either is questionable, there is in their Lordships' judgment no room even for comparison.

(1) [1899] 2 Ch. 264, 273.

The judgments in favour of the respondent on this point in the Courts below have been based on what their Lordships cannot help thinking is a misunderstanding of the decision of the Court of Appeal in *Oliver* v. *Hinton*. (1) There the contest in a non-register county was between a person in the position of the appellant and one, not in the position of the respondent, but of a mortgagee from him by deposit made subsequent to the date of his purchase deed. "The defendant has been cheated by Hill, but she has not been in any way cheated by the plaintiff," says Lindley M.R. In that passage Hill corresponds roughly to the respondent, and the plaintiff to his subsequent mortgagee by deposit. No production of the deeds was required by the purchasing defendant. The plaintiff was entirely blameless in the matter. On these facts the Court held that the defendant had been guilty of such gross negligence in not asking for the deeds as would render it unjust to deprive the plaintiff who held them of his priority. Their Lordships can see no analogy between that case, properly understood, and the present. It is not necessary to say that the respondent here was as bad as Hill was there. But it is through the respondent's representations that the appellant has been led to part with his money. That which then was gross negligence in relation to the possibility of a prior equitable charge, is not necessarily any negligence at all in relation to the possibility of a resulting trust. It is only of the latter negligence, if any there be, that the respondent can claim the benefit. There is nothing in Lord Lindley's judgment to indicate that the protection which he extended to the entirely blameless mortgagee by deposit he would have thought of extending to the respondent in the present case.

For all these reasons their Lordships are of opinion that this appeal should be allowed; that the judgment of the full Court of the Supreme Court of Hong Kong of August 28, 1930, and the judgment of that Court in its original jurisdiction of April 8, 1930, should both be discharged; and that the respondent's action should be dismissed and with costs in both Courts. Their Lordships will humbly advise His Majesty accordingly. The respondent must pay to the appellant his costs of this appeal.

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(1) [1899] 2 Ch. 264, 273.

Solicitors for appellant: *Gibson & Weldon.*
Solicitors for respondent: *Sharpe, Pritchard & Co.*

[PRIVY COUNCIL.]

J. C.*
1932
July 7.

AUSTRALIAN INVESTMENT TRUST, LIMITED . . . . } APPELLANTS;

AND

STRAND AND PITT STREET PROPERTIES, LIMITED . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Company—Issue of Shares—Underwriting Agreement—Ultra Vires—Companies Acts, 1899–1918 (*No.* 40 *of* 1899 *as amended; N.S.W.*).

A company limited by shares incorporated under the Companies Acts, 1899–1918, of New South Wales, cannot validly contract for the underwriting of an issue of its shares at a commission. The Acts contain no provision (such as was first introduced into the English Companies Acts in 1900) authorizing the payment of underwriting commissions, and the agreement is in effect for the issue of shares at a discount and is consequently ultra vires the company.

Ex parte Audain (1889) 42 Ch. D. 1 discussed.

Judgment of Long Innes J., 31 S. R. (N. S. W.) 266, reversed.

APPEAL (No. 116 of 1931) from an order, dated April 9, 1931, of the Supreme Court of New South Wales, in Equity, allowing the respondent company's demurrer in a suit instituted by the appellant company.

The appeal in substance was as to the validity of a written agreement by which the appellant company underwrote the whole of an issue of 175,000 ordinary shares in the respondent company for a commission of one shilling upon each share underwritten.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR JOHN WALLIS.

The judgment of the Judicial Committee sets out the agreement in question and states the material facts of the case.

Each of the companies was incorporated under the Companies Acts, 1899–1918, of New South Wales, as a company limited by shares. So far as material to the questions arising these Acts are identical with the English Companies Acts, 1862–1867; they contain no provision corresponding to s. 8 of the Act of 1900, now replaced (with amendments) by s. 43 of the Act of 1928.

The trial judge, Long Innes J., held that the agreement was intra vires the company and valid. The judgment is reported at 31 S. R. (N. S. W.) 266.

1932. June 13, 14. *Gavin Simonds K.C.* and *J. H. Stamp* for the appellants. The underwriting agreement was ultra vires the respondent company, as it was an agreement to issue shares at a discount, and involved a misapplication of the company's capital. There is no English decision considering and determining the validity of an underwriting agreement made before the operation of s. 8 of the English Companies Act, 1900. That probably is because those engaged in the business of underwriting issues did not think that it was in their interests to raise the question. *Ex parte Audain* (1) related to an underwriting agreement, but the validity of the agreement was not considered, the question being as to its meaning. The weight of text-book authority supports the appellants: Lindley on Companies, 6th ed., p. 43; Buckley on Companies, 11th ed., p. 98. In *Ooregum Gold Mining Co. of India* v. *Roper* (2), it was held by the House of Lords that the issue of shares at a discount was ultra vires. That principle applies although the agreement is to take shares the number of which depends upon a contingency. There was no service to be performed by the underwriters other than taking the shares, and consequently no consideration to support the agreement to pay commission.

(1) 42 Ch. D. 1.

(2) [1892] A. C. 125.

Different considerations apply to agreements to pay brokerage for the placing of shares; the payment in that case is analogous to a payment for advertising. The distinction was pointed out in *Gorrissen's Case.* (1) The Companies Act, 1929, in s. 43 maintains the distinction between brokerage and underwriting agreements. It may be that the appellants are not entitled to have their names removed from the register without refunding any commission which they received, but having regard to clause 7 of the agreement it does not appear that any commission has been paid.

F. D. Morton K.C. and *Rink* for the respondents. A company can lawfully issue shares as fully paid although the whole or part of the consideration consists of services which it agrees to accept as representing money's worth: *Ooregum Gold Mining Co.* case. (2) The respondents obtained a greater benefit from the agreement than the mere obligation of the respondents to take up the number of shares which they might eventually have to take up, since they obtained, before the issue of the prospectus, the assurance that the money necessary for the immediate purposes of the company would be forthcoming. The appellants bound themselves in advance to take up not only 60,000 shares, but contingently the whole 175,000. The commission payable bore no relation to the number of shares which had to be taken up. Moreover the agreement saved the respondent the expense of brokerage; it was in the nature of a brokerage agreement, which admittedly is lawful. The agreement considered in *Ex parte Audain* (3) was similar to that in this case. It was there argued that if the agreement was to take shares, not to place them, it was invalid as involving an issue of shares at less than their nominal value. The Court of Appeal (Cotton, Lindley and Bowen L.JJ.), having held that the agreement was an underwriting agreement, treated it as a valid agreement. In *Hilder* v. *Dexter* (4) Lord Davey refers to the view that an underwriting agreement, though made before 1901, was valid, and expressed no dissent from that view.

(1) (1873) L. R. 8 Ch. 507.
(2) [1892] A. C. 125, 136.
(3) 42 Ch. D. 1.
(4) [1902] A. C. 474, 478, 479.

J. C.
1932

AUSTRALIAN INVESTMENT TRUST v. STRAND AND PITT STREET PROPERTIES.

[In addition to cases already mentioned reference was made to *Melhado* v. *Porto Alegre, etc., Ry. Co.* (1); *In re Plaskynaston Tube Co.* (2); *In re Ince Hall Rolling Mills Co.* (3); *In re Almada and Tirito Co.* (4) (which overruled the two decisions last mentioned); *Lydney & Wigpool Iron Ore Co.* v. *Bird* (5); *In re Faure Electric Accumulator Co.* (6); *Shaw* v. *Bentley & Co. and the Yorkshire Breweries, Ld.* (7); *Metropolitan Coal Consumers' Association* v. *Scrimgeour.* (8)] Further, the agreement did not necessarily involve the payment of the commission out of capital. In any case the appellants are not entitled in equity to relief, as they did not offer to repay any commission received.

July 7. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal brought pursuant to leave granted by the Supreme Court of New South Wales from an order dated April 9, 1931, of that Court in its equitable jurisdiction (Long Innes J.), allowing the respondents' demurrer to the appellants' statement of claim in the action.

In the action the appellants are seeking to have the share register of the respondents rectified by the deletion therefrom of the name of the appellants as the holders of 16,308 shares of 1*l.* in the capital of the respondents.

The question at issue is whether an underwriting agreement made on April 15, 1929, and subsequently adopted by the respondents, pursuant to which the shares in question were allotted to the appellants, is, as the appellants allege, ultra vires the respondents.

Both parties to the appeal are companies limited by shares incorporated in New South Wales under the provisions of the New South Wales Companies Acts, 1899 to 1918.

The New South Wales Companies Acts, 1899 to 1918, contain no provision expressly authorizing the payment of underwriting commissions such as that first introduced in

(1) (1874) L. R. 9 C. P. 503.
(2) (1883) 23 Ch. D. 542.
(3) (1882) 23 Ch. D. 545*n*.
(4) (1888) 38 Ch. D. 415.
(5) (1886) 33 Ch. D. 85.
(6) (1888) 40 Ch. D. 141.
(7) (1893) 68 L. T. 812.
(8) [1895] 2 Q. B. 604.

England by s. 8 of the Companies Act, 1900, and now embodied in s. 43 of the Companies Act, 1929, and both sides agree that the law applicable in New South Wales to the question involved in this appeal can be treated as identical with that which prevailed in England before s. 8 of the Companies Act, 1900, came into operation.

It is upon a consideration of the English law as it stood before s. 8 of the Companies Act, 1900, came into operation, that the learned judge in the Court below reached his conclusion, and that their Lordships have now to determine the appeal.

The facts as appearing in the statement of claim demurred to are in effect as hereinafter stated.

On April 15, 1929, by means of two letters, the first from the appellants to one Keith Williams as trustee for a company then about to be formed and registered, and the other from Keith Williams to the appellants, an agreement for the underwriting by the appellants of a proposed issue of capital of the proposed company was entered into.

The first of such letters was as follows:—

"Strand & Pitt Street Properties Limited.

(A Company about to be formed and registered under the provisions of the New South Wales Companies Acts 1899–1918 and herein referred to as 'the Company.')

Capital: 250,000*l.* in 250,000 Shares of 1*l.* each.

To KEITH WILLIAMS, Esquire,
17, O'Connell Street,
Sydney, N.S.W.
(as Trustee for the Company).

Sir,

1. With reference to the proposal to offer one hundred and seventy-five thousand ordinary shares in the Company to the public for subscription at One pound per share and for the considerations hereinafter mentioned The Australian Investment Trust Limited a Company formed and incorporated under the New South Wales Companies Acts and carrying on business at Sydney aforesaid (hereinafter referred to as 'the Trust') hereby underwrites the whole of the said One hundred and seventy-five thousand shares so to be offered

with a right to make a firm and irrevocable application for sixty thousand of such shares.

2. The Trust's application and subscription are to be on the terms of the Company's prospectus to be finally settled and issued provided always that it shall be issued within sixty days from the date hereof and that such Prospectus as finally settled and issued does not differ in any material particular from the draft prospectus as now published a copy of which is annexed hereto and signed by Frederick John Leslie Dunlop on behalf of the Trust.

3. The Trust's firm application for sixty thousand shares or any part thereof if and when made is to be viewed as marked in relief of its underwriting and in respect to such underwriting the Trust or its nominee is not to be allotted any greater number of shares than the number which it has underwritten.

4. All applications which may be initialled by or for the Trust and (subject to that which is hereinafter mentioned) approved by you and sent in by the Trust to you or to the Company prior to the time fixed by the prospectus for closing the list of subscribers are to be applied primarily in relief of the Trust's underwriting and shall not be reckoned as subscriptions by the public always provided that prior to such closing due notice is given to you by the Trust that it requires such initialled applications to be so applied as in relief of its own application.

5. All such applications as are mentioned in the last preceding paragraph shall be approved and accepted by the Company provided that they are presented on a form of application approved by the Company that the applicants are responsible persons and that the applications are accompanied by application moneys according to the terms of the Prospectus. In the event of any dispute arising as to whether any applicant is a responsible person every applicant shall be deemed to be a responsible person if any Bank be of opinion that such applicant is a responsible person or company to take up the number of shares applied for.

6. The Trust hereby irrevocably authorises you or the Company by any one of its officers in the name or on behalf of the

Trust to sign and put in an application in the form referred to in the Prospectus as published for the number of shares underwritten by the Trust and to take an allotment in its name in respect thereof and the Trust hereby agrees to pay to the Company the application and allotment moneys immediately after receiving notice of allotment.

7. Subject as hereinafter mentioned the Company shall within fourteen days after it shall have become entitled to commence business pay to the Trust a commission in cash of one shilling per share on the shares hereby underwritten including those firmly applied for by it but no commission is payable until the application moneys payable on the shares have been paid to the Company and notice of allotment given to the applicant.

8. No allotment to the Trust is to be made before the expiration of seven days after the first issue of the prospectus.

9. The obligations of the Trust hereunder are to hold good notwithstanding any variation between the draft prospectus annexed hereto and the prospectus as finally settled and published provided that the amount of the capital of the Company namely two hundred and fifty thousand pounds divided into two hundred and fifty thousand shares of one pound each is not altered and that the terms of subscription namely five shillings per share on application five shillings per share on allotment and the balance in calls of not more than five shillings per share at intervals of not less than three months are not altered and provided further that such prospectus as finally settled and published does not differ in any material particular from the draft prospectus attached hereto.

10. You are to be at liberty on behalf of the Trust to concur with the Company in making a contract under which the Company is to take your place for the purposes hereof and thereupon you will be released from any liability hereunder.

11. Any notice to the Trust may be served by sending the same by post addressed to the Trust at the address under stated and shall be deemed to be served on the day following that on which it is posted.

Be so good as to notify the Trust of your acceptance of this proposal.

Dated April 15, 1929.

The Australian Investment Trust, Limited.
Signature : F. J. L. DUNLOP, Managing Director.
Address : Brook House, 17, O'Connell St., Sydney."

The second letter was as follows :—

"Acceptance of underwriting proposal.
Strand and Pitt Street Properties Limited.

(A Company about to be formed and registered under the provisions of the New South Wales Companies Acts 1899–1918.)

Capital : 250,000*l.* in 250,000 Shares of 1*l.* each.

THE AUSTRALIAN INVESTMENT TRUST, LIMITED,
17, O'Connell Street,
Sydney.

Dear Sirs,

Referring to your letter to me of the Fifteenth day of April 1929 proposing to underwrite One hundred and seventy-five thousand ordinary shares of One pound each in the above named company I HEREBY as Trustee for the Company Strand and Pitt Street Properties Limited AGREE to accept same upon the footing and subject to the conditions referred to in your said letter.

Dated April 15, 1929.

KEITH WILLIAMS,
Trustee for the proposed Company."

The respondents (the company contemplated by the letters of April 15, 1929) were duly incorporated on April 23, 1929, with a capital of 250,000*l.* divided into 250,000 shares of 1*l.* each.

A prospectus was issued offering 175,000 shares for public subscription. This prospectus, which presumably was substantially identical with the draft prospectus copy of which was annexed to the first letter of April 15, 1929, contained (inter alia) the following passages :—

"Underwriting Agreements.

A copy of the underwriting agreement dated April 15, 1929, between Keith Williams as trustee for Strand and Pitt

Street Properties Limited of the one part and The Australian Investment Trust, Limited, of the other part may be inspected at the offices of Messrs. Alfred Rofe & Sons, Solicitors to the Company, Rofe Chambers, O'Connell Street, Sydney.

A clause in the former agreement meaning thereby the underwriting agreement provides that the underwriters shall have the right to make firm application for and be allotted 60,000 of the shares now offered for subscription.

Brokerage.

The underwriters will pay a brokerage of 6*d*. per share on allotments in respect of applications identified as coming through members of any recognised Stock Exchange. The directors reserve the right to reject any application without giving reasons therefor."

On June 11, 1929, by an agreement in writing between the appellants, Keith Williams and the respondents, the agreement contained in the two letters of April 15, 1929, was duly adopted by the respondents and made binding on the appellants and respondents, and Keith Williams was discharged from liability thereunder.

On June 30, 1930, the appellants set up that the underwriting agreement was ultra vires the respondents and unenforceable.

On October 9, 1930, the respondents, in pursuance of the underwriting agreement, allotted to the appellants 16,308 shares of 1*l*. each in the capital of the respondents.

On October 29, 1930, the appellants filed the statement of claim in the suit out of which this appeal arises, alleging that the taking up of any of the shares pursuant to the underwriting agreement involved payment by the respondents out of their share capital of commission in respect of such shares, and claiming to have the share register rectified by the deletion therefrom of the name of the appellants as the holders of any of the 16,308 shares.

The respondents demurred ore tenus on April 9, 1931. Long Innes J., in a valuable judgment in which the authorities are carefully reviewed, and which has been of much assistance to their Lordships, reached the conclusion that the demurrer

J. C.
1932
AUSTRALIAN INVESTMENT TRUST
v.
STRAND AND PITT STREET PROPERTIES.

should be allowed. At the same time, the learned judge gave the appellants liberty to amend the statement of claim within twenty-one days, and ordered that in default of amendment within that time the suit should be dismissed.

Leave to appeal to His Majesty in Council was subsequently obtained from the Supreme Court of New South Wales.

The decision of the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper* (1) made it plain that a company limited by shares could not issue its shares as fully paid up for a money consideration less than their nominal value.

In his speech in that case Lord Watson (2), after referring to the relevant sections of the Companies Act, 1862, said : "In my opinion, these enactments read together indicate the intention of the legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value." And later on he said : "Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance, when duly called for. A company is free to contract with an applicant for its shares ; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares."

The difference between subscribing for shares and placing shares had been previously well explained by Mellish L.J. in *Gorrissen's Case* (3), where he said : " It appears to me that an agreement to place shares, even although the person making it binds himself that within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares, then by agreeing to take shares he does at that moment become a shareholder, and the company are entitled, and are indeed bound, at that moment to put him on the register. But if he agrees to place shares, he does not agree to become a shareholder, nor are the company entitled to put him on the register as a shareholder, but he simply agrees that he will procure other persons to take the shares."

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(1) [1892] A. C. 125.
(2) [1892] A. C. 136.
(3) L. R. 8 Ch. 507, 515.

The principles indicated in the foregoing quotations are in no respect impinged upon by the decision that payment by a company of brokerage to brokers for placing its shares with other persons is legitimate: see *Metropolitan Coal Consumers' Association* v. *Scrimgeour.* (1)

The point as to the validity of commission paid by a company to a person for subscribing for or underwriting its share capital was however never clearly decided in England before the passing of the Companies Act, 1900, unless, as has been urged before their Lordships, such a decision is to be found in the case of *Licensed Victuallers' Mutual Trading Association. Ex parte Audain* (2), which will be examined presently.

Upon this point of commission Lord Lindley in the sixth edition of his work on Companies, published in 1902, at p. 43 expressed himself as follows: "After some doubt it was decided before the Companies Act, 1900, was passed that a limited company might pay a reasonable sum to brokers by way of brokerage for placing its shares, but the better opinion seems to have been that such a company could not make any payment out of capital to a person for subscribing for or underwriting its shares."

When the matter was before the judge below the parties agreed that for the purpose of construing the letters of April 15, 1929, the word "underwrite" should be taken to mean "to agree to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public." This is a definition which seems to

(1) [1895] 2 Q. B. 604.

(2) 42 Ch. D. 1.

express accurately the meaning of the word "underwrite" in the sense in which it is commonly used.

Now it is not disputed that an agreement by a company to pay a commission to a person in consideration of his subscribing in praesenti for a definite number of shares in the company's capital would be ultra vires the company. It would in effect be an arrangement whereby he was allowed a rebate or discount on the amount payable by him for the shares for which he agreed to subscribe.

But it is said that the position is different where, as in an underwriting agreement, on the one hand, the obligation of the subscriber is to subscribe only for such number of shares, if any, as the public may not take up, so that in the result he may not be under liability to subscribe for any share at all, while, on the other hand, the consideration for the obligation to subscribe, namely the commission, is payable in any event and is not in amount related to the number of shares, if any, which ultimately have to be taken up under the agreement.

For the purpose of determining whether such an underwriting agreement is within the powers of the company their Lordships are content to apply the test suggested by Lord Watson in the passages already quoted from his speech in *Ooregum Gold Mining Co. of India* v. *Roper*. (1) What are the services rendered by the underwriter in return for the commission over and beyond his agreement to subscribe for shares? In their Lordships' opinion the answer must be that there are none.

In the case of an agreement to subscribe for a definite number of shares in praesenti it could not be suggested that there was any consideration for the commission beyond the agreement to take shares. What further obligation is imposed on the underwriter or what further service does he undertake to render because the number of shares (if any) which he becomes bound to take up depends upon a contingency —namely, the course the public will take in regard to the issue?

The learned judge below has said: "In substance an underwriting agreement is a contract of guarantee or indemnity

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(1) [1892] A. C. 125, 136.

J. C.
1932

Australian Investment Trust
v.
Strand and Pitt Street Properties.

whereby the underwriter in effect guarantees that the whole of the shares in question will be subscribed by undertaking that to the extent to which they are not otherwise subscribed he will apply for them himself. It is in effect equivalent to a contract of insurance and might be expressed as such."

With all respect to the learned judge their Lordships are of opinion that the ambit of the obligation of the underwriter cannot be altered or enlarged by changing the language by which the contract is described. The obligation in fact is and remains nothing more or less than an obligation to subscribe for shares in the company. It is true that it is an obligation to subscribe for shares only on the happening of a contingent event, the number if any of the shares to be taken up depending upon the magnitude of the event; but this is an obligation of the same nature as an obligation to subscribe for a definite number of shares in praesenti, though of more uncertain burden until it is crystallized by the happening of the contingency.

In both cases the commission is agreed to be paid to induce the same thing—namely, the undertaking of the obligation to subscribe. No other service than undertaking this obligation is in either case rendered by the receiver of the commission. In both cases he in effect receives from the company a discount or rebate upon the amount payable upon the shares which he has to take up. It cannot make any difference that under the underwriting agreement he may not in the event have to take up any share and may yet get his commission all the same.

It is true that the benefit to the company of an underwriting agreement may be great, but to resolve the question now under consideration the benefit to the company is not a relevant matter. The solution must be found in the obligation undertaken by the underwriter.

It has, however, been contended before their Lordships that this view of the matter is inconsistent with the decision of the English Court of Appeal, to which Lord Lindley (then Lindley L.J.) was a party in *Ex parte Audain*. (1) Two points only were decided in that case. First, after hearing expert evidence the Court determined the meaning of the

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(1) 42 Ch. D. 1.

J. C.
1932
AUSTRALIAN INVESTMENT TRUST v. STRAND AND PITT STREET PROPERTIES.

term "underwriting," and secondly the Court held that the phrase in the underwriting agreement "at 15 per cent. discount" did not mean discount but commission. The question whether an agreement to underwrite shares for a commission was intra vires or ultra vires the company does not appear to have been argued by counsel or considered by the Court. Their Lordships are therefore unable to obtain any assistance from this decision.

The reference in the prospectus in the present case to payment of brokerage by the underwriters (a matter not mentioned in the underwriting agreement) does not in their Lordships' opinion affect the matter. Applying the considerations which have been already indicated their Lordships reach the conclusion that the learned judge below was in error in allowing the demurrer and that the appeal must succeed. The order of Long Innes J. should be discharged and in lieu thereof the demurrer of the respondents should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

The costs here and below will be borne by the respondents.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondents: *Gwyn Davies & Co.*

END OF VOL. AND OF APPELLATE SERIES FOR 1932.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1932, will be as follows :—

In the First Series,
[1932] 1 Ch.   [1932] 2 Ch.

In the Second Series,
[1932] 1 K. B.   [1932] 2 K. B.   [1932] P.

In the Third Series,
[1932] A. C.

INDEX.

ADMINISTRATION—*Insolvent Estate—Debt due to Executor—Retainer—Crown Debt—Priority—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 34, 57, *Sch. I., Part I.—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*).

Decision of the Court of Appeal [1931] 1 Ch. 389 reversed. ATT.-GEN. *v.* JACKSON **H. L. (E.) 365**

AERIAL NAVIGATION—Legislative power **54**
See CANADA **2.**

ALBERTA.
See CANADA **6.**

APPEAL—Competence of to Privy Council **542**
See AUSTRALIA **1.**

—— Right of—To Privy Council - - **106**
See CANADA **14.**

ARTICLE OF FOOD—Defect likely to injure health—Liability of manufacturer to ultimate consumer - - **562**
See NEGLIGENCE.

AUSTRALIA—*Freedom of inter-State Trade—Compulsory Acquisition of Dried Fruit in South Australia—Privy Council—Competence of Appeal—Limits inter se of Constitutional Powers—Dried Fruits Act,* 1924 (*No.* 1657 *of* 1924; *South Australia*), *ss.* 20, 28—*Commonwealth of Australia Constitution Act* (63 *&* 64 *Vict. c.* 12) *Constitution, ss.* 74, 92.

Judgment of the High Court of Australia, 43 C. L. R. 386, reversed. JAMES *v.* COWAN **J. C. 542**

2. —— *Patent — Application to amend Specification — Subsequent Proceedings for Revocation—Modification of proposed Amendments—Jurisdiction—Patents Act,* 1903–1921 (*No.* 21 *of* 1903; *Commonwealth*), *ss.* 71, 80, 81.

COWPER *v.* PAPER SACKS PROPRIETARY, LD. - - - - - - - **J. C. 709**

3. —— **(NEW SOUTH WALES)**—*Company—Issue of Shares—Underwriting Agreement—Ultra Vires—Companies Acts,* 1899–1918 (*No.* 40 *of* 1899 *as amended*; *N. S. W.*).

Judgment of Long Innes J., 31 S. R. (N. S. W.) 266, reversed. AUSTRALIAN INVESTMENT TRUST, LD. *v.* STRAND AND PITT STREET PROPERTIES, LD. - - **J. C. 735**

4. —— **(NEW SOUTH WALES)**—*Constitution—Abolition of Legislative Council—Act requiring Referendum—Act not to be repealed without Referendum—Powers of Legislature of State—" Manner and Form "—Constitution Act,* 1902 (*No.* 32 *of* 1902—*No.* 28 *of* 1929; *N.S.W.*), *s.* 7A—*Colonial Laws Validity Act,* 1865 (28 *&* 29 *Vict. c.* 63), *s.* 5.

Judgment of the High Court of Australia, 44 C. L. R. 394, affirmed. ATT.-GEN. FOR NEW SOUTH WALES *v.* TRETHOWAN **J. C. 526**

BANKER—Bank of issue—Exchange of good notes for bad—Inconvertible currency—Measure of damages - **452**
See BREACH OF CONTRACT.

BILL OF LADING—Liberty to call at ports " for bunkering or other purposes "—Construction - - - **328**
See SHIPPING.

BODILY INJURIES—Action for—Prescription - - - - - **295**
See CANADA **13.**

BREACH OF CONTRACT — *Measure of Damages—Contract to print Bank Notes—Bank of Issue—Delivery to unauthorized Person—Spurious Notes put into Circulation—Withdrawal of Issue and Exchange of Notes of that issue, good or bad, for other Notes of Bank—Loss on Exchange of Notes of an inconvertible Currency.*

BANCO DE PORTUGAL *v.* WATERLOW & SONS, LD. WATERLOW & SONS, LD. *v.* BANCO DE PORTUGAL - - - - **H. L. (E.) 452**

BREACH OF DUTY—Non-disclosure—Rescission of contract - - 161
See MISTAKE.

BREWERY COMPANY—Tied houses—Income tax — Profits of trade — Deduction of expenses - - 407
See REVENUE **6.**

BRITISH COLUMBIA.
See CANADA.

CALCULATED TO DECEIVE—Old mark—Registration—Similar mark already on register - - - - 130
See TRADE MARK.

CANADA—*Interpretation of Statute—Crown —Crown Debts — Priority — Competing Dominion Tax and Provincial Tax—Legislative Power — Bankruptcy — Taxation — British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *heads* 3, 21—*Interpretation Act* (*R. S. Can.*, 1906, *c.* 1), *s.* 16.

Judgment of the Supreme Court of Canada [1929] S. C. R. 557 reversed. *In re* SILVER BROTHERS, LD. ATT.-GEN. FOR QUEBEC *v.* ATT.-GEN. FOR CANADA - - **J. C. 514**

2. —— *Legislative Power — Aerial Navigation—International Convention—Dominion Power as to Treaty Obligations—Residual Legislative Power—Matter of National Interest and Importance—Reference of abstract Questions — Aeronautics Act* (*R. S. Can.*, 1927, *c.* 3), *s.* 4—*Air Regulations*, 1920—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92, 132.

Judgment of the Supreme Court of Canada [1930] S. C. R. 663 reversed. REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re* - - - - - - **J. C. 54**

3. —— *Legislative Power — Radio Communication — International Convention — Absence of Treaty by British Empire—Matter of National Importance—Telegraphs —Works and Undertakings connecting Provinces—British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 ; *s.* 92, *head* 10 (*a*) ; *s.* 132.

Judgment of the Supreme Court of Canada [1931] S. C. R. 541 affirmed. REGULATION AND CONTROL OF RADIO COMMUNICATION IN CANADA, *In re* - - - - **J. C. 304**

4. —— *Legislative Power—Insurance Business in Province — Aliens — Immigration — Taxation — Provincial matter disguised as Dominion matter—Insurance Act* (*R. S. Can.*, 1927, *c.* 101), *ss.* 11, 12—*Special War Revenue Act* (*R. S. Can.*, 1927, *c.* 179), *s.* 16—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92, 95.

Judgment of the Court of King's Bench for Quebec varied. INSURANCE ACT OF CANADA, *In re* - - - - - - **J. C. 41**

5. —— *Vesting and Control of Public Lands—Rupert's Land and North-Western Territory—Order in Council of June* 23, 1870

CANADA—*continued.*

— *Alienations by Dominion — Claim by Province of Saskatchewan — Validity o Dominion Legislation—Dominion Lands Act* (35 *Vict. c.* 23, *Dom.*)—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 109, 146—*Rupert's Land Act*, 1868 (31 *&* 32 *Vict. c.* 105), *s.* 5.

Judgment of the Supreme Court of Canada [1931] S. C. R. 263 affirmed. NATURAL RESOURCES (SASKATCHEWAN), *In re* **J. C. 28**

6. —— **(ALBERTA)**—*Legislative Power—Prevention of Fraud—Official Investigations —Dominion Companies—Criminal Law—Security Frauds Prevention Act*, 1930 (20 *Geo.* 5, *c.* 8 ; *Alb.*)—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.

Judgment of the Supreme Court of Alberta, 25 Alb. L. R. 310, reversed. LYMBURN *v.* MAYLAND - - - - - **J. C. 318**

7. —— **(BRITISH COLUMBIA)** — *Income Tax—Income from Business—Receipt under Insurance of Loss of Profits due to Fire—Taxation Act* (*R. S. B. C.*, 1924, *c.* 254), *s.* 2.

Judgment of the Supreme Court of Canada [1931] S. C. R. 435 reversed. REX *v.* B. C. FIR AND CEDAR LUMBER CO., LD. **J. C. 441**

8. —— **(MANITOBA)** — *Negligence—Motor Vehicle — Onus of Proof — Uncontradicted Evidence of inevitable Accident—Function o Jury—Motor Vehicle Act* (*Consolidated Amendments*, 1924, *c.* 131 ; *Manitoba*), *s.* 62.

Judgment of the Supreme Court of Canada [1931] S. C. R. 443 affirmed. WINNIPEG ELECTRIC CO. *v.* GEEL - - **J. C. 690**

9. —— **(ONTARIO)**—*Legislative Power — "Royalties"—Fines for Criminal Offences —Dominion Act diverting Fines from Provincial Treasury—Criminal Law—Criminal Code of Canada*, *s.* 1036, *sub-s.* 1—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *head* 27 ; *s.* 109.

Judgment of the Appellate Division, 65 Ont. L. R. 320, reversed. TORONTO CITY CORPORATION *v.* THE KING - - **J. C. 98**

10. —— **(QUEBEC)**—*City of Montreal—Cost of Street Paving—Liability of Frontagers —Construction of Statutes—General Act superseding Special Act*—1 *Geo.* 5, *c.* 48 (*Quebec*), *s.* 62—18 *Geo.* 5, *c.* 97 (*Quebec*), *s.* 15.

Judgment of the Supreme Court of Canad reversed. CITY OF MONTREAL *v.* MONTREA INDUSTRIAL LAND CO., LD. - **J. C. 70**

11. —— **(QUEBEC)**—*Legislative Power — Expropriation by City of Montreal— Assessment of Compensation — Competence o Tribunal — Finality of Award — City o Montreal Charter, art.* 429 —*Quebec Public Service Commission Act* (*R. S. Queb.*, 1925 *c.* 17)—*British North America Act*, 186 (30 *&* 31 *Vict. c.* 3), *ss.* 96, 129.

Judgment of the Court of King's Benc affirmed. MARTINEAU, O., & SONS, LD. *v* MONTREAL CITY - - - - **J. C. 11**

CANADA—*continued.*

12. —— **(QUEBEC)** — *Municipal Law — Municipal and School Taxes—Gas Mains—"Immoveables"—"Land"—Jurisdiction of Superior Court—Civil Code, art.* 376—*Code of Civil Procedure, art.* 54—*Cities and Towns Act* (*R. S. Q.*, 1925, *c.* 102), *ss.* 521, 534, 537 —*Education Act* (*R. S. Q.*, 1925, *c.* 133)—*Protestant School Act*, 1925 (15 *Geo.* 5, *c.* 45; *Queb.*), *s.* 16.

Judgment of the Court of King's Bench, Appeal Side (1930) Q. R. 49 K. B. 456 affirmed. Montreal Light, Heat and Power Consolidated *v.* City of Outremont - - - - - **J. C. 423**

13. —— **(QUEBEC)**—*Prescription of Action —Negligence—Bodily Injuries—Action for Damages—Injuries to Third Person—Medical Expenses and Loss of Services—Civil Code, art.* 2262 (2).

Judgment of the Supreme Court of Canada [1929] S. C. R. 650 reversed. Regent Taxi and Transport Co., Ld. *v.* Congrégation des Petits Frères de Marie - **J. C. 295**

14. —— **(QUEBEC)**—*Right of Appeal to Privy Council—Rights in Future—Duty of Court to decide whether Case is appealable—Code of Civil Procedure* (*Quebec*), *art.* 68.

Davis . Shaughnessy - - **J. C. 106**

CASES :—

—— *Ambler, In re* [1905] 1 Ch. 697. Overruled unless distinguishable. Att.-Gen. *v.* Jackson **H. L. (E.) 365**

—— *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* [1914] A. C. 153, 162. Referred to. Regulation and Control of Aeronautics in Canada, *In re* - - **J. C. 54**

—— *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* [1916] 1 A. C. 588. Referred to. Insurance Act of Canada, *In re* - - **J. C. 41**

—— *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* [1929] A. C. 260. Distinguished. Lymburn *v.* Mayland - - - - **J. C. 318**

—— *Att.-Gen. for Ontario* v. *Reciprocal Insurers* [1924] A. C. 328. Followed. Insurance Act of Canada, *In re* - - **J. C. 41**

—— *Att.-Gen. for Quebec* v. *Nipissing Central Ry. Co.* [1926] A. C. 715. Distinguished. *In re* Silver Brothers, Ld. Att.-Gen. for Quebec *v.* Att.-Gen. for Canada **J. C. 514**

—— *Audain, Ex parte* (1889) 42 Ch. D. 1. Discussed. Australian Investment Trust, Ld. *v.* Strand and Pitt Street Properties, Ld. **J. C. 735**

CASES—*continued.*

—— *Bradlaugh* v. *Clarke* (1883) 8 App. Cas. 354, 358, 368. Applied. Toronto City Corporation *v.* The King - **J. C. 98**

—— *Collyer* v. *Hoare & Co., Ld.* [1931] 1 K. B. 123. Reversed - - - - **407**

—— *Connor* v. *Cadzow Coal Co., Ld.* 1930 S. C. 840. Reversed - - - - - **1**

—— *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245. Overruled. English Scottish and Australian Bank, Ld. *v.* Inland Revenue Commissioners **H. L. (E.) 238**

—— *Davenport* v. *The Queen* (1877) 3 App. Cas. 115. Followed. Jardine *v.* Att.-Gen. for Newfoundland - **J. C. 275**

—— *Duncan's Executors* v. *Farmer* 1909 S. C. 1212; 5 Tax Cas. 417. Distinguished. Stedeford *v.* Beloe - - **H. L. (E.) 388**

—— *Finn* v. *Kerslake* [1931] A. C. 446, 457. Distinguished. Toogood & Sons, Ld. *v.* Green - **H. L. (E.) 663**

—— *Fordree* v. *Barrell* [1931] 2 K. B. 257. Affirmed - - - - **676**

—— *Foscolo, Mango & Co., Ld.* v. *Stag Line, Ld.* [1931] 2 K. B. 48. Affirmed - - - - **328**

—— *Fraser* v. *City of Fraserville* [1917] A. C. 187. Followed. Martineau, O., & Sons, Ld. *v.* Montreal City - **J. C. 113**

—— *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432. Applied. Hoare & Co., Ld. *v.* Collyer - - **H. L. (E.) 407**

—— *George* v. *Skivington* (1869) L. R. 5 Ex. 1. Approved. Donoghue *v.* Stevenson **H. L. (Sc.) 562**

—— *Gillett, E. W., & Co.* v. *Lumsden* [1905] A. C. 601. Headnote in, criticized. Davis *v.* Shaughnessy - - **J. C. 106**

—— *Gliksten, J., & Son, Ld.* v. *Green* [1929] A. C. 381. Followed. Rex *v.* B. C. Fir and Cedar Lumber Co., Ld. - **J. C. 441**

—— *Healey* v. *Société Anonyme Française Rubastic* [1917] 1 K. B. 946, 947. Dictum of Avory J. in, approved. Bell *v.* Lever Brothers, Ld. **H. L. (E.) 161**

—— *Hearts of Oak Assurance Co., Ld.* v. *Att.-Gen.* [1931] 2 Ch. 370. Reversed - - - - **392**

CASES—*continued.*

—— *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, 509–11.
Dicta of Brett M.R. in, considered. Donoghue *v.* Stevenson **H. L. (Sc.) 562**

—— *Inland Revenue Commissioners* v. *Holder* [1931] 2 K. B. 81.
Affirmed - - - - **624**

—— *Jackson* v. *Att.-Gen.* [1931] 1 Ch. 389.
Reversed - - - - **365**

—— *Johnstone* v. *Consolidated London Properties, Ld.* [1931] 1 K. B. 263.
Reversed - - - - **351**

—— *Jones* v. *Commonwealth Court of Conciliation and Arbitration* [1917] A. C. 528.
Distinguished. James *v.* Cowan **J. C. 542**

—— *Kaye* v. *Eyre Brothers, Ld.* [1931] A. C. 446, 451.
Distinguished. Toogood & Sons, Ld. *v.* Green - **H. L. (E.) 663**

—— *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1867) L. R. 2 Q. B. 580.
Followed. Bell *v.* Lever Brothers, Ld. - **H. L. (E.) 161**

—— *Keren Kayemeth Le Jisroel, Ld.* v. *Inland Revenue Commissioners* [1931] 2 K. B. 465.
Affirmed - - - - **650**

—— *Kettlewell* v. *Watson* (1884) 26 Ch. D. 501.
Distinguished. Tsang Chuen *v.* Li Po Kwai - - - **J. C. 715**

—— *Lever Brothers, Ld.* v. *Bell* [1931] 1 K. B. 557.
Reversed - - - - **161**

—— *Manson* v. *Wesley* [1931] 2 K. B. 375.
Affirmed - - - - **635**

—— *Montreal, City of* v. *Montreal Street Ry. Co.* [1912] A. C. 333, 342.
Observation in, discussed. Regulation and Control of Radio Communication in Canada, *In re* **J. C. 304**

—— *Mullen* v. *Barr & Co., Ld. and M'Gowan* v. *Barr & Co., Ld.*, 1921 S. C. 461.
Overruled. Donoghue *v.* Stevenson **H. L. (Sc.) 562**

—— *Nicholson & Sons' Application, In re* [1931] 2 Ch. 1.
Affirmed with a variation, sub nom. Bass, Ratcliff and Gretton, Ld. *v.* Nicholson & Sons, Ld. **130**

—— *Oliver* v. *Hinton* [1899] 2 Ch. 264.
Distinguished. Tsang Chuen *v.* Li Po Kwai - - - **J. C. 715**

—— *Regulation and Control of Aeronautics in Canada, In re* [1932] A. C. 54.
Applied. Regulation and Control of Radio Communication in Canada, *In re* - - - **J. C. 304**

—— *Richards* v. *Butcher*, Dictum of Lord Esher in [1891] 2 Ch. 522, 543.
Disapproved. Bass, Ratcliff and Gretton, Ld. *v.* Nicholson & Sons, Ld. - - - **H. L. (E.) 130**

—— *Rimmer* v. *Webster* [1902] 2 Ch. 163, 173.
Applied. Tsang Chuen *v.* Li Po Kwai - - - **J. C. 715**

—— *Rustomjee* v. *The Queen* (1876) 1 Q. B. D. 487; 2 Q. B. D. 69.
Approved and followed. Civilian War Claimants Association *v.* The King - - **H. L. (E.) 14**

—— *Servini, Ex parte* [1914] 1 K. B. 77
Distinguished. Kossekechatko *v.* Att.-Gen. for Trinidad - **J. C. 79**

—— *Smelting Company of Australia, Ld.* v. *Inland Revenue Commissioners* [1897] 1 Q. B. 175.
Overruled. English Scottish and Australian Bank, Ld. *v.* Inland Revenue Commissioners **H. L. (E.) 238**

—— *Stedeford* v. *Beloe* [1931] 2 K. B. 610.
Affirmed - - - - **388**

—— *Toogood & Sons, Ld.* v. *Green* [1932] 1 K. B. 204.
Reversed - - - - **663**

—— *Turpin* v. *Middlesbrough Assessment Committee* [1931] A. C. 446, 451.
Distinguished. Toogood & Sons, Ld. *v.* Green - **H. L. (E.) 663**

—— *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433.
Explained and followed. Hoare & Co., Ld. *v.* Collyer **H. L. (E.) 407**

—— *Velazquez, Ld.* v. *Inland Revenue Commissioners* [1914] 3 K. B. 458.
Overruled. English Scottish and Australian Bank, Ld. *v.* Inland Revenue Commissioners **H. L. (E.) 238**

CEYLON — *Constitutional Law — Legislative Council—Order in Council—Reservation of Power to amend Order—Action for Penalties — Amending Order in Council—Indemnity—Ceylon (Legislative Council) Order,* 1923, *arts.* 16, 17—*Ceylon (Legislative Council) Amendment Order,* 1928, *arts.* 2, 3.

Judgment of the Supreme Court of Ceylon affirmed. Abeyesekera *v.* Jayatilake **J. C. 260**

CHARITY—Association for settlement of Jews in Palestine—Income tax **650**
See Revenue 1.

COLONIES.
See Australia, Canada, Ceylon, Hong Kong, Newfoundland, New Zealand. Palestine, Trinidad.

COMMONWEALTH OF AUSTRALIA—
Constitution - - - - **542**
See Australia 1.

COMPANY—Issue of shares—Underwriting agreement—Ultra vires - - 735
See AUSTRALIA (NEW SOUTH WALES) 3.

COMPENSATION — To civilians for war damage - - - - - 14
See CROWN.

CONSTITUTIONAL LAW — Legislative Council - - - - 260
See CEYLON.

CROWN—*Petition of Right—War Damage—Compensation for Civilians — Treaty of Versailles—Payments by Germany—Claim that the Crown was Agent or Trustee of the Moneys received under the Treaty.*

CIVILIAN WAR CLAIMANTS ASSOCIATION *v.* THE KING - - - - **H. L. (E.) 14**

CROWN DEBT — Priority — Bankruptcy — Right of retainer - - - 365
See ADMINISTRATION.

CROWN LANDS—Timber licence - 275
See NEWFOUNDLAND.

DERATING.
See RATING.

DEVIATION—Reasonableness - - 328
See SHIPPING.

DISCONTINUANCE OF BUSINESS—During year of assessment to income tax—Additional assessment for preceding year—Computation - - 635
See REVENUE 5.

EXTRADITION — Convicted criminal - 78
See TRINIDAD.

FIDUCIARY RELATION—Breach of duty—Non-disclosure - - - 161
See MISTAKE.

FOOD — Defect likely to injure health — Liability of manufacturer to ultimate consumer - - - 562
See NEGLIGENCE.

FREEDOM OF INTER-STATE TRADE 542
See AUSTRALIA 1.

FURNISHED ROOMS—Sub-letting—Effect of—Decontrol of house - 676
See LANDLORD AND TENANT.

HONG KONG—*Registration of Deed—Statutory Memorial — Receipt Clause — Alleged Trust— Admissibility of Evidence—Estoppel — Negligence — Non-production of Deed — Land Registration Ordinance,* 1844 (*No.* 1 *of* 1844; *Hong Kong*), *ss.* 4, 7.

Judgment of the Supreme Court of Hong Kong reversed. TSANG CHUEN *v.* LI PO KWAI **J. C. 715**

INCOME TAX—Brewery company—Tied houses—Profits of trade—Deduction of expenses - - - - 407
See REVENUE 6.

INCOME TAX—*continued.*

—— Charity — Association for settling Jews in Palestine - - - - 650
See REVENUE 1.

—— County of London—Blocks of flats—Unit of assessment—Allowances for repairs - - - - - 351
See REVENUE 2.

—— Guarantee—Interest payable on advance from bank—Payment by guarantor of total indebtedness—Claim to repayment of income tax on part representing interest - - 624
See REVENUE 3.

—— Pension—Chargeability to tax - 388
See REVENUE 4.

—— Profits of business—Discontinuance of business in year of assessment — Additional assessment for preceding year—Computation - - 635
See REVENUE 5.

—— (**COLONIAL**)—Receipt under insurance of loss of profits due to fire - 441
See CANADA (BRITISH COLUMBIA) 7.

—— —— Deduction—Directors' fees - 683
See NEW ZEALAND.

INDUSTRIAL DISEASE — Certificate of recovery - - - - 1
See WORKMEN'S COMPENSATION.

INDUSTRIAL HEREDITAMENT — Seed cleaning premises—"Primarily used and occupied for purposes of retail shop" - - - - - 663
See RATING.

INDUSTRIAL INSURANCE.
See INSURANCE.

INQUIRY—Industrial insurance company—Inspector appointed by Industrial Assurance Commissioner—Investigation of company's affairs — Publicity of inquiry - - 392
See INSURANCE (INDUSTRIAL).

INSOLVENT ESTATE—Executor's right of retainer—Crown debt—Priority 365
See ADMINISTRATION.

INSURANCE (Industrial) — *Insurance Company — Appointment by Industrial Assurance Commissioner of Inspector to investigate Affairs of Company—Right to hold Inquiry in Public—Friendly Societies Act,* 1896 (59 & 60 *Vict. c.* 25), *s.* 76, *sub-s.* 5—*Industrial Assurance Act,* 1923 (13 & 14 *Geo.* 5, *c.* 8), *s.* 17, *sub-s.* 1.

Decision of the Court of Appeal [1931] 2 Ch. 370 reversed. HEARTS OF OAK INSURANCE CO., LD. *v.* ATT.-GEN. **H. L. (E.) 392**

INTERNATIONAL CONVENTION — Radio communication - - - 304
See CANADA 2.

JUDICIAL COMMITTEE—Appeals.
See Australia, Canada, Ceylon, Hong Kong, Newfoundland, New South Wales, New Zealand, Palestine, Trinidad.

LANDLORD AND TENANT—*Rent Restriction—Recovery of Possession—Dwelling-house—Effect of Sub-letting of Furnished Rooms—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12.

Decision of the Court of Appeal [1931] 2 K. B. 257 affirmed. Barrell *v.* Fordree **H. L. (E.) 676**

LEGISLATIVE POWER—Aerial navigation 54
See Canada 2.

—— Bankruptcy—Taxation - - 514
See Canada 1.

—— Dominion or Provincial—Criminal Law 318
See Canada 6.

—— Dominion or Provincial — Insurance business in Province - - 41
See Canada 4.

—— Expropriation by City of Montreal—Assessment of compensation—Competence of tribunal - - 113
See Canada 11.

—— Fines for criminal offences—Dominion Act diverting fines from Provincial treasury - - - - - 98
See Canada 9.

—— Radio communication - - 304
See Canada 3.

LIFE INSURANCE—Pre-war policy—Ottoman subjects—Trieste Company—Currency - - - - 268
See Palestine.

MANITOBA.
See Canada.

MANUFACTURER—Article of food—Defect likely to cause injury to health—Liability to ultimate consumer 562
See Negligence.

MEASURE OF DAMAGES—Loss to bank on giving good notes in exchange for bad—Inconvertible currency 452
See Breach of Contract.

MISTAKE—*Mutual Mistake—Mistake as to Legal Rights—Fiduciary Relation—Breach of Duty—Non-disclosure—Rescission of Contract.*

Decision of the Court of Appeal [1931] 1 K. B. 557 reversed. Bell *v.* Lever Brothers, Ld. - - - **H. L. (E.) 161**

MUNICIPAL AND SCHOOL TAXES - 423
See Canada 12.

MUTUAL MISTAKE—Rescission of contract - - - - - - 161
See Mistake.

NEGLIGENCE—*Liability of Manufacturer to ultimate Consumer—Article of Food—Defect likely to cause Injury to Health.*

M'Alister (or Donoghue) *v.* Stevenson **H. L. (Sc.) 562**

—— Motor vehicle—Onus of proof - 690
See Canada (Manitoba) 8.

NEWFOUNDLAND — *Timber License — Breach of Condition—Forfeiture—Waiver—Acceptance of Rent—"Conditions herein contained"—Incorporation of Statutory Conditions — Penalties — Damages — Absence of contractual Obligation—Crown Lands Act*, 1903 (3 *Edw.* 7, *c.* 6, *Newfd.*), *s.* 25, *as amended* 1911—*Crown Lands Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 15), *s.* 2.

Judgment of the Supreme Court of Newfoundland reversed. Jardine *v.* Att.-Gen. for Newfoundland - - - **J. C. 275**

NEW SOUTH WALES.
See Australia.

NEW SOUTH WALES CONSTITUTION—Abolition of Legislative Council 526
See Australia (New South Wales).

NEW ZEALAND—*Income Tax—Assessment—Deduction—Company—Directors' Fees—Resolution of Company—Land and Income Tax Act*, 1923 (*No.* 21 *of* 1923; *N. Z.*), *s.* 80, *sub-s.* 2.

Judgment of the Court of Appeal of New Zealand [1930] N. Z. L. R. 935 affirmed. Aspro, Ld. *v.* Commissioner of Taxes **J. C. 683**

ONTARIO.
See Canada 9.

ORDER IN COUNCIL.
See Rules and Regulations.

PALESTINE — *Life Insurance — Pre-War Policy—Ottoman Subjects—Trieste Company—Agreement to pay Gold Francs—Currency—Treaty of Lausanne*, 1923, *section II., Annex* (2).

Judgment of the Supreme Court of Palestine reversed. Assicurazioni Generali *v.* Selim Cotran - - - **J. C. 268**

PATENT — Amendment of specification — Revocation - - - - 709
See Australia.

PENSION—Chargeability to income tax 388
See Revenue 4.

PETITION OF RIGHT—Compensation to civilians for war damage—Moneys received under treaty - - 14
See Crown.

PRESCRIPTION OF ACTION—Bodily injuries - - - - - 295
See Canada 13.

PRIVY COUNCIL—Appeals.
See Judicial Committee.

—— Competence of appeal - - 542
See Australia 1.

—— Right of appeal to - - - 106
See Canada 14.

PUBLIC LANDS—Vesting and control—Validity of Dominion legislation 28
See Canada 5.

QUEBEC.
See Canada.

RATING—*Derating—Industrial Hereditament—Seed Cleaning Premises—Seeds sold to Retail Customers—Primarily occupied and used for Purposes of a Retail Shop—Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1 ; *s.* 4.

Decision of the Court of Appeal [1932] 1 K. B. 204 reversed. Toogood and Sons, Ld. *v.* Green - - - **H. L. (E.) 663**

REGISTERED MEMORIAL OF DEED—Alleged trust—Estoppel - 715
See Hong Kong.

REGISTRATION OF TRADE MARK—Limitations on - - - 130
See Trade Mark.

RENT RESTRICTION—Recovery of possession—Sub-letting of furnished rooms
See Landlord and Tenant. 676

RESCISSION OF CONTRACT—Mutual mistake — Breach of duty — Non-disclosure - - - - 161
See Mistake.

RETAIL SHOP—Premises primarily used as—Industrial hereditament - 663
See Rating.

RETAINER—Executor's right of 365
See Administration.

REVENUE—*Income Tax—Association for settling Jews in Palestine and Elsewhere—Charity—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37.

Decision of the Court of Appeal [1931] 2 K. B. 465 affirmed. Keren Kayemeth Le Jisroel, Ld. *v.* Inland Revenue Commissioners - - - - - **H. L. (E.) 650**

2. —— —— *County of London — Blocks of Flats — Unit of Assessment — "House or Building let in different . . . . Tenements" — Assessment on Landlord — Allowances for Repairs — Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 45 — *Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule A, No. V., r.* 7 ; *No. VII., r.* 8 (*c*).

Decision of the Court of Appeal [1931] 1 K. B. 263 reversed. Consolidated London Properties, Ld. *v.* Johnstone **H. L. (E.) 351**

REVENUE—*continued.*

3. —— —— *Interest Payable on Advance from a Bank—Guarantees of Company's Indebtedness to Bank—Payment by Guarantors of Total Indebtedness—Claim to Repayment of Income Tax on Part representing Interest—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.

Decision of the Court of Appeal [1931] 2 K. B. 81 affirmed. Holden *v.* Inland Revenue Commissioners - **H. L. (E.) 624**

4. —— —— *Pension to Headmaster on Retirement — Voluntary Payment — Chargeability to Income Tax — Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule E—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

Decision of the Court of Appeal [1931] 2 K. B. 610 affirmed. Stedeford *v.* Beloe **H. L. (E.) 388**

5. —— —— *Permanent Discontinuance of Business—Additional Assessment for Year preceding Discontinuance—Mode of Computation—Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29 ; *s.* 31, *sub-s.* 1 (*b*) ; *s.* 34, *sub-s.* 1 (*a*) ; *s.* 35.

Decision of the Court of Appeal [1931] 2 K. B. 375 affirmed. Wesley *v.* Manson **H. L. (E.) 635**

6. —— —— *Profits of Trade — Deduction of Expenses — Brewery Company — Tied Houses—Premiums paid by Tenants—Rent forgone for Purposes of Trade—Loss of Rent on certain Tied Houses owing to Tie—Profit Rentals on other Tied Houses—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D, Rules applicable to Cases I. and II., r.* 3.

Decision of the Court of Appeal [1931] 1 K. B. 123 reversed. Hoare & Co., Ld. *v.* Collyer - - - - **H. L. (E.) 407**

7. —— *Stamp Duty — Agreement for Sale of simple Contract Debts owed by Debtors resident Abroad—Exemption from Duty—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

English, Scottish and Australian Bank, Ld. *v.* Inland Revenue Commissioners **H. L. (E.) 238**

RIGHT OF APPEAL.
See Appeal.

RULES AND REGULATIONS :—

—— *Ceylon (Legislative Council) Order,* 1923, *arts.* 16, 17 ; *Ceylon (Legislative Council) Amendment Order,* 1928, *arts.* 2, 3 : Abeyesekera *v.* Jayatilake - - - **J. C. 260**

SHIPPING—*Charterparty—Bill of Lading—Liberty to call at Ports in any order for "bunkering or other purposes"—Deviation to land Engineers supervising Superheating Apparatus — "Reasonable deviation" — Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Art. IV., r.* 4.

Decision of the Court of Appeal [1931] 2 K. B. 48 affirmed. Stag Line, Ld. *v.* Foscolo, Mango & Co., Ld. **H. L. (E.) 328**

STAMP DUTY—Exemption—Agreement for sale of simple contract debts owed by debtors resident abroad - 238
See Revenue 7.

STATUTES :—

I. Imperial.

1865.

28 & 29 Vict. c. 63 (Colonial Laws Validity), s. 5: Att.-Gen. for New South Wales *v.* Trethowan - **J. C. 526**

1867.

30 & 31 Vict. c. 3 (British North America), ss. 91, 92: Lymburn *v.* Mayland **J. C. 318**

—— —— ss. 91, 92, 95: Insurance Act of Canada, *In re* - - **J. C. 41**

—— —— ss. 91, 92, 132: Regulation and Control of Aeronautics in Canada, *In re* - - **J. C. 54**

—— —— s. 91, heads 3, 21: *In re* Silver Brothers, Ld. Att.-Gen. for Quebec *v.* Att.-Gen. for Canada **J. C. 514**

—— —— s. 91, head 27; s. 109: Toronto City Corporation *v.* The King **J. C. 98**

—— —— s. 92, head 10 (*a*); s. 132: Regulation and Control of Radio Communication in Canada, *In re* - - - - **J. C. 304**

—— —— ss. 96, 129: Martineau, O., & Sons, Ld. *v.* Montreal City **J. C. 113**

—— —— ss. 109, 146: Natural Resources (Saskatchewan), *In re* **J. C. 28**

1868.

31 & 32 Vict. c. 105 (Rupert's Land), s. 5: Natural Resources (Saskatchewan), *In re* - - - **J. C. 28**

1869.

32 & 33 Vict. c. 67 (Metropolis Valuation), s. 45: Consolidated London Properties, Ld. *v.* Johnstone **H. L. (E.) 351**

1870.

33 & 34 Vict. c. 52 (Extradition), s. 10: Kossekechatko *v.* Att.-Gen. for Trinidad - - - **J. C. 78**

1896.

59 & 60 Vict. c. 25 (Friendly Societies), s. 76, sub-s. 5: Hearts of Oak Assurance Co., Ld. *v.* Att.-Gen. **H. L. (E.) 392**

1900.

63 & 64 Vict. c. 12 (Commonwealth of Australia Constitution), Constitution, ss. 74, 92: James *v.* Cowan **J. C. 542**

STATUTES—*continued.*

1905.

5 Edw. 7, c. 15 (Trade Marks), ss. 3, 9, 11, 19, 21: Bass, Ratcliff & Gretton, Ld. *v.* Nicholson & Sons, Ld. **H. L. (E.) 130**

1914.

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 33, sub-s. 1 (*a*): Att.-Gen. *v.* Jackson **H. L. (E.) 365**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), s. 36, sub-s. 1: Holder *v.* Inland Revenue Commissioners **H. L. (E.) 624**

—— —— s. 37: Keren Kayemeth Le Jisroel, Ld. *v.* Inland Revenue Commissioners - **H. L. (E.) 650**

—— —— Sch. A, No. V., r. 7; No. VIII., r. 8 (*c*): Consolidated London Properties, Ld. *v.* Johnstone **H. L. (E.) 351**

—— —— Sch. D, Rules applicable to Cases I. and II., r. 3: Hoare & Co., Ld. *v.* Collyer - **H. L. (E.) 407**

—— —— Sch. E: Stedeford *v.* Beloe **H. L. (E.) 388**

1919.

9 & 10 Geo. 5, c. 79 (Trade Marks), Sch. II.: Bass, Ratcliff & Gretton, Ld. *v.* Nicholson & Sons, Ld. **H. L. (E.) 130**

1920.

10 & 11 Geo. 5, c. 17 (Increase of Rent, etc. (Restrictions)), s. 12: Barrell *v.* Fordree - - **H. L. (E.) 676**

1922.

12 & 13 Geo. 5, c. 17 (Finance), s. 18: Stedeford *v.* Beloe **H. L. (E.) 388**

13 & 14 Geo. 5, c. 8 (Industrial Assurance), s. 17, sub-s. 1: Hearts of Oak Assurance Co., Ld. *v.* Att.-Gen. **H. L. (E.) 392**

1924.

14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea), Sch., Art. IV., r. 4: Stag Line, Ld. *v.* Foscolo, Mango & Co., Ld. - - - **H. L. (E.) 328**

1925.

15 Geo. 5, c. 23 (Administration of Estates), ss. 34, 57; Sch. I., Part I.: Att.-Gen. *v.* Jackson - **H. L. (E.) 365**

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 9, sub-s. 4; s. 43: Connor *v.* Cadzow Coal Co., Ld. **H. L. (Sc.) 1**

1926.

16 & 17 Geo. 5, c. 22 (Finance), s. 29; s. 31, sub-s. 1 (*b*); s. 34, sub-s. 1 (*a*); s. 35: Wesley *v.* Manson **H. L. (E.) 635**

STATUTES—*continued.*

1928.

18 & 19 Geo. 5, c. 44 (Rating and Valuation (Apportionment)), s. 3, sub-s. 1; s. 4: TOOGOOD & SONS, LD. *v.* GREEN - - **H. L. (E.) 663**

II. COLONIAL.

AUSTRALIA.

1899.

No. 40 of 1899 as amended (Companies Act, 1899–1918) N. S. W.: AUSTRALIAN INVESTMENT TRUST, LD. *v.* STRAND AND PITT STREET PROPERTIES, LD. - - - **J. C. 735**

1902.

No. 32 of 1902—No. 28 of 1929, N.S.W. (Constitution), s. 7A: ATT.-GEN. FOR NEW SOUTH WALES *v.* TRETHOWAN - - - **J. C. 526**

1903.

No. 21 of 1903 Commonwealth (Patents Act, 1903–1921), ss. 71, 80, 81: COWPER *v.* PAPER SACKS PROPRIETARY, LD. - - - **J. C. 709**

1924.

No. 1657 of 1924, South Australia (Dried Fruits), ss. 20, 28: JAMES *v.* COWAN **J. C. 542**

CANADA.

(Quebec) Civil Code, art. 376: MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT **J. C. 423**

—— —— art. 2262 (2): REGENT TAXI AND TRANSPORT CO., LD. *v.* CONGRÉGATION DES PETITS FRÈRES DE MARIE - - - **J. C. 295**

—— Code of Civil Procedure, art. 54: MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT - - - - **J. C. 423**

Code of Civil Procedure (Quebec), art. 68: DAVIS *v.* SHAUGHNESSY - **J. C. 106**

Criminal Code of Canada, s. 1036, sub-s. 1: TORONTO CITY CORPORATION *v.* THE KING - - - - **J. C. 98**

1872.

35 Vict. c. 23, Dom. (Dominion Lands): NATURAL RESOURCES (SASKATCHEWAN), *In re* - - - **J. C. 28**

1906.

R. S. Can., 1906, c. 1 (Interpretation), s. 16: *In re* SILVER BROTHERS, LD. ATT.-GEN. FOR QUEBEC *v.* ATT.-GEN. FOR CANADA - - - **J. C. 514**

STATUTES—*continued.*

1910.

1 Geo. 5, c. 48 (Quebec), s. 62: CITY OF MONTREAL *v.* MONTREAL INDUSTRIAL LAND CO., LD. - - **J. C. 700**

1924.

Motor Vehicle Act (Consolidated Amendments, 1924, c. 131; Manitoba), s. 62: WINNIPEG ELECTRIC CO. *v.* GEEL - - - - **J. C. 690**

R. S. B. C., 1924, c. 254 (Taxation), s. 2: REX *v.* B. C. FIR AND CEDAR LUMBER CO., LD. - - **J. C. 441**

1925.

R. S. Queb., 1925, c. 17 (Quebec Public Service Commission): MARTINEAU, O., & SONS, LD. *v.* MONTREAL CITY **J. C. 113**

R. S. Q., 1925, c. 102 (Cities and Towns), ss. 521, 534, 537: MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT - **J. C. 423**

15 Geo. 5, c. 45; Queb. (Protestant School), s. 16: MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT - - - **J. C. 423**

R. S. Q., 1925, c. 133 (Education): MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT - - - - **J. C. 423**

1927.

R. S. Can., 1927, c. 3 (Aeronautics), s. 4: REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re* **J. C. 54**

—— —— c. 101 (Insurance), ss. 11, 12: INSURANCE ACT OF CANADA, *In re* **J. C. 41**

—— —— c. 179 (Special War Revenue), s. 16: INSURANCE ACT OF CANADA, *In re* - - - - **J. C. 41**

1928.

18 Geo. 5, c. 97 (Quebec), s. 15: CITY OF MONTREAL *v.* MONTREAL INDUSTRIAL LAND CO., LD. - **J. C. 700**

1930.

20 Geo. 5, c. 8, Alb. (Security Frauds Prevention): LYMBURN *v.* MAYLAND - - - - **J. C. 318**

HONG KONG.

1844.

No. 1 of 1844, Hong Kong (Land Registration), ss. 4, 7: TSANG CHUEN *v.* LI PO KWAI - - **J. C. 715**

STATUTES—*continued.*

NEWFOUNDLAND.

1903.

3 Edw. 7, c. 6, Newfd. (Crown Lands), s. 25, as amended 1911: JARDINE *v.* ATT.-GEN. FOR NEWFOUNDLAND **J. C. 275**

1918.

8 & 9 Geo. 5, c. 15, Newfd. (Crown Lands), s. 2: JARDINE *v.* ATT.-GEN. FOR NEWFOUNDLAND - - **J. C. 275**

NEW ZEALAND.

1923.

No. 21 of 1923, N. Z. (Land and Income Tax), s. 80, sub-s. 2: ASPRO, LD. *v.* COMMISSIONER OF TAXES **J. C. 683**

TRINIDAD.

1925.

Revised Laws of Trin. and Tob., 1925, c. 24 (Summary Conviction Offences Procedure Ordinance), ss. 11, 12: KOSSEKECHATKO *v.* ATT.-GEN. FOR TRINIDAD - - - **J. C. 78**

—— —— c. 250 (French Guiana Extradition Ordinance), s. 5: KOSSEKECHATKO *v.* ATT.-GEN. FOR TRINIDAD **J. C. 78**

STREET PAVING—Costs—Liability of frontagers - - - - - **700**
See CANADA (QUEBEC) **10.**

TIMBER LICENCE—Breach of conditions—Forfeiture—Waiver - - - 275
See NEWFOUNDLAND.

TOTAL INCAPACITY—Industrial disease 1
See WORKMEN'S COMPENSATION.

TRADE MARK—*Old Mark—Registration—Distinctive Mark used before August, 1875—User as a Trade Mark—Similar Mark already on Register—Registration calculated to deceive*

TRADE MARK—*continued.*

—Honest concurrent User—Limitations on Registration—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9, 11, 19, 21—Trade Marks Act, 1919 (9 & 10 Geo. 5, c. 79), Sch. II.

Decision of the Court of Appeal [1931] 2 Ch. 1 affirmed with a variation. BASS, RATCLIFF & GRETTON, LD. *v.* NICHOLSON & SONS, LD. - - - - **H. L. (E.) 130**

TREATY OF LAUSANNE, 1923, s. II., Annex (2) - - - - 268
See PALESTINE.

TRINIDAD — *Extradition — Convicted Criminal—French Extradition Treaty, 1876—Absence of Proof that Crime committed in France—Irregularities in Magistrate's Order—Entry in Magistrate's Book—Summary Conviction Offences (Procedure) Ordinance (Revised Laws of Trin. and Tob., 1925, c. 24), ss. 11, 12—French Guiana Extradition Ordinance (Revised Laws of Trin. and Tob., 1925, c. 250), s. 5—Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 10.*

Judgment of the Supreme Court of Trinidad and Tobago reversed. KOSSEKECHATKO *v.* ATT.-GEN. FOR TRINIDAD - - **J. C. 78**

USER AS A TRADE MARK—Old mark—Registration - - - - 130
See TRADE MARK.

WAR DAMAGE—Compensation to civilians—Moneys received under Treaty 14
See CROWN.

WORKMEN'S COMPENSATION — *Total Incapacity — Industrial Disease — Certificate that Workman had not completely recovered in respect that he was more susceptible to the Disease than before the attack—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 4; s. 43.*

Interlocutor of the Second Division of the Court of Session in Scotland, 1930 S. C. 840, reversed. CONNOR *v.* CADZOW COAL COMPANY, LD. - - - - **H. L. (Sc.) 1**

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(p. 1 to p. 129).

PART I.—FEBRUARY 3.

TABLE OF CASES.

APPEAL CASES.

		PAGE
CIVILIAN WAR CLAIMANTS ASSOCIATION *v.* THE KING	H. L. (E.)	14
CONNOR *v.* CADZOW COAL CO.	H. L. (Sc.)	1
DAVIS *v.* SHAUGHNESSY	P. C.	106
INSURANCE ACT OF CANADA, *In re*	P. C.	41
KOSSEKECHATKO *v.* ATT.-GEN. FOR TRINIDAD	P. C.	78
MARTINEAU (O.) AND SONS, LD. *v.* CITY OF MONTREAL	P. C.	113
NATURAL RESOURCES (SASKATCHEWAN), *In re*	P. C.	28
REGULATION AND CONTROL OF AERONAUTICS IN CANADA, *In re* ..	P. C.	54
TORONTO CITY CORPORATION *v.* THE KING	P. C.	98

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.
[*For Names of Editors and Reporters see Inside.*]

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